TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, ~~1931~~ 1932

No. ~~706~~ 4

SEABOARD AIR LINE RAILWAY COMPANY,
APPELLANT,

vs.

A. W. WATSON

APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA

FILED FEBRUARY 16, 1932

(36,520)

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[fol. 4]

IN CIRCUIT COURT OF GADSDEN COUNTY

Recital as to Summons

On the 26th day of January, A. D. 1928, plaintiff filed his præcipe for summons ad respondendum.

On the 26th day of January, A. D. 1928, summons ad respondendum was issued.

On the 26th day of January, A. D. 1928, service of summons ad respondendum was made on defendant.

In Circuit Court, Second Judicial Circuit, of Florida in and for Gadsden County

A. W. Watson, Plaintiff,

vs.

Seaboard Air Line Railway Company, a Corporation, Defendant

Declaration—Filed Feb. 9, 1928

A. W. Watson, by his Attorney, sues the Seaboard Air Line Railway Company, a corporation organized and existing under the laws of Virginia and North Carolina and doing business in Gadsden County, State of Florida, in an action of trespass on the case; for this, to-wit: That the defendant heretofore, on the 26th day of October, A. D. 1926, and on divers days before and since that time up to and including the present time, said defendant was possessed of and had control of and managed a line of railroad in said State and in said County, known and called the Seaboard Air Line Railway Company, and did use, manage and operate it by running its engine and train of cars on and over said road each and every day in said State [fol. 5] and said County, and that it was the duty of the said Railway Company to move and operate its said engine

and train of cars over said line of said railroad with reasonable and proper care and caution and at a reasonable and proper rate of speed so as to avoid running into and injuring persons crossing without negligence on their part across said railroad at public road crossings or places along the line of said railroad in Gadsden County, Florida, where the highways of Gadsden County and roads pass over and across said line of railroad so operated and owned by the said defendant, and to give notice and warning of the approach of said trains so run and operated by said railroad to points where public highways and roads cross said railroad in order that persons crossing over said railroad along said highways and public roads might be warned and have knowledge of the approach of the said train of said railway company.

That at a certain place, to-wit, about four miles west of Quincy Depot and Station on said railroad of the defendant in Gadsden County, Florida, and which is a place where the public highway and road of Gadsden County, Florida, known as the Aspalaga Road, which has been used as a public highway and road for many years last past, crossed over said line of railroad and it then and there became and was the duty of the said defendant in operating its said engine and train of cars oevr and along said line of its said railroad at said point where the said Aspalaga public road crossed same, to operate, control and maintain its engine and cars with reasonable and proper care and caution and at a reasonable and proper rate of speed and so as to avoid running into and injuring persons passing without negligence on their part across or along the aforesaid public highway.

Yet the said defendant, disregarding its duty as aforesaid, did, on the 26th day of October, A. D. 1926, by one of [fol. 6] its enginemen and employees carelessly and negligently run and operate its said engine and train of cars across said public road crossing at a high, rapid and excessive rate of speed and failed to give warning and notice by the blowing of the whistle or otherwise of the approach of said train, and as a direct and proximate cause of said carelessness and negligence the said engine and train of cars were with great force and violence run into and driven against the said mules and a wagon belonging to the said plaintiff and which a servant of the said plaintiff was then

and there driving with reasonable and proper care and caution along said public highway and across said railroad, by means of which said premises the said wagon was violently pushed and rammed and was suddenly turned up on one side and the plaintiff's mules were thereby violently struck and knocked down and killed, one of said mules being then and there of the value of Three Hundred ($300.00) Dollars, and the other of said mules being of the value of Three Hundred and fifty ($350.00) Dollars, and the said wagon was damaged so as to require the expenditure on the part of the plaintiff of Twenty-five ($25.00) Dollars in having the same repaired.

Wherefore the plaintiff says that he has been damaged and injured by said defendant in the sum of One Thousand ($1000.00) Dollars.

J. Baxter Campbell, Attorney for Plaintiff.

IN CIRCUIT COURT OF GADSDEN COUNTY

RECITAL AS TO APPEARANCE

On the 6th day of February, A. D. 1928, appearance was entered on behalf of defendant.

[fol. 7] IN CIRCUIT COURT OF GADSDEN COUNTY

[Title omitted]

DEFENDANT'S PLEAS—Filed March 5, 1928

Now comes the defendant, Seaboard Air Line Railway Company, a Corporation, by J. L. Davidson and W. J. Oven, its attorneys, and for pleas to the plaintiff's declaration says:

1. That it is not guilty.

2. The defendant for a further plea to the plaintiff's declaration says that the servant of the plaintiff, who was driving the plaintiff's said team at the time and place when and where the plaintiff's said team was killed and the said wagon was damaged, so carelessly and negligently handled

and conducted himself and drove said team and failed to stop and to look and to listen for the approach of a train on the defendant's railroad tracks, the location and use of which said track and the approximate time of the passing of defendant's trains thereon and thereover during the day, were then and there known to the said servant of the said plaintiff and to the said plaintiff, that the said injury and damage sustained by plaintiff was thereby caused solely by the negligence of the servant of the plaintiff in failing to use reasonable and ordinary care in crossing said railroad track, and the said plaintiff is thereby barred from recovery.

3. The defendant for a further plea to the plaintiff's declaration says that the servant of the plaintiff who was [fol. 8] driving the plaintiff's said team at the time and place when and where the plaintiff's said team was killed and the said wagon was damaged, so carelessly and negligently handled and conducted himself and drove said team and failed to stop and to look and to listen for the approach of a train on the defendant's railroad tracks—the location and use of which said track and the approximate time of the passing of the defendant's trains thereon and thereover during the day—was then and there known to the said servant of the said plaintiff and to the said plaintiff, that the said injury and damage sustained by plaintiff was thereby caused solely by the negligence of the servant of the plaintiff in failing to use reasonable and ordinary care in crossing said railroad track, and the said plaintiff is thereby barred from recovery regardless of the alleged failure of the defendant, its agents or servants, to give warning and notice by the blowing of the whistle or otherwise of the approach of its said train.

4. The defendant for a further plea to plaintiff's declaration says that the servant of the plaintiff who was driving the plaintiff's said team at the time and place when and where the plaintiff's said team was killed and the said wagon was damaged so carelessly and negligently handled and conducted himself and drove said team and failed to stop and to look and to listen for the approach of a train on the defendant's railroad tracks—the location and use of which said track and the approximate time of the passing of defendant's trains thereon and thereover during the day

—were then and there known to the said servant of the said plaintiff and to the said plaintiff, that the said injury and damage sustained by plaintiff was thereby contributed to by the negligence of the servant of the plaintiff in failing to use reasonable and ordinary care in crossing said railroad track, and the said plaintiff thereby through and by [fol. 9] the negligence of his servant and agent contributed to the injury and damage in said declaration alleged.

5. And the defendant for a further plea says that the plaintiff contributed to the injury and damage by him sustained through and by the negligence and carelessness of his servant and agent in charge of his said team in that the servant and agent of the plaintiff in the drtving of said team when approaching the track of the defendant failed to observe and use reasonable and ordinary care to determine whether or not a train of the defendant was approaching said crossing on the track of the defendant before he, the said agent and servant of the said plaintiff, attempted to drive thereon and thereover.

Jas. L. Davidson, W. J. Oven, Attorneys for Defendant.

Duly sworn to by J. E. Haire. Jurat omitted in printing.

IN CIRCUIT COURT OF GADSDEN COUNTY

PLAINTIFF'S JOINDER OF ISSUE ON DEFENDANT'S PLEAS

The following issue was joined on said pleas:
Plff. joins issue on defendant's pleas.

J. Baxter Campbell, Watson & Taylor, Attys. for Plaintiff.

[fol. 10] IN CIRCUIT COURT OF GADSDEN COUNTY

VERDICT

On the 22nd day of March, A. D. 1929, at a term of said Court, came the respective parties by their attorneys, and submitted said cause on the issue joined between them to a jury, who were sworn acording to law and who, having

heard the evidence, the argument of counsel and the charge of the Court, on the 22nd day of March, A. D. 1929, returned the following verdict:

March 22nd, 1929.

We, the jury, find for the plaintiff and assess his damages at the sum of $564.00 Dollars. So say we all.

E. B. Woodberry, Jr., Foreman.

IN CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT OF THE STATE OF FLORIDA IN AND FOR GADSDEN COUNTY, FLORIDA

A. W. WATSON

vs.

SEABOARD AIR LINE RAILWAY CO., a Corporation

JUDGMENT—March 22, 1929

This cause coming on this day for trial and the plaintiff and defendant being present, and by their respective attorneys having announced ready, thereupon came a jury of good and lawful men, to-wit, E. B. Woodberry, Jr., T. W. Green, C. B. Green, T. W. Fletcher, B. M. Elder and J. L. Rowan, who were *f*uly elected, tried and sworn the truth to speak upon the issue joined who, after hearing the evidence, argument of counsel and charge of the Court, retired to consider of their verdict. And afterward returned into open Court with the following verdict, to-wit:

We, the jury, find for the plaintiff and assess his damages at the sum of $564.00. So say we all.

E. B. Woodberry, Jr., Foreman.

It is, therefore, considered, ordered and adjudged by the [fol. 11] Court that the plaintiff, A. W. Watson, do have and recover of and from the defendant, Seaboard Air Line Railway Company, a Corporation, the said sum of Five Hundred sixty-four Dollars ($564.00) so found by the jury, and also his cost in this behalf expended to be taxed by the Clerk of this Court.

Upon consideration of the defendant's motion for time, it is ordered that the defendant be allowed ten days from

this date in which to prepare and present a motion for a new trial in this cause.

Done and ordered in open Court this March 22, 1929.

E. C. Love, Judge.

IN CIRCUIT COURT OF GADSDEN COUNTY

[Title omitted]

ORDER AS TO BILL OF EXCEPTIONS, ETC.—March 30, 1929

This cause came on this day to be further heard on the motion of defendant for an order allowing time in which to prepare and present its bill of exceptions in this cause, and for the fixing of the amount of supersedeas bond, and same having been duly considered, it is, therefore, upon consideration thereof,

Ordered and Adjudged that the said defendant be and is allowed sixty days from this date in which to prepare and present its bill of exceptions in this cause. And

It is further ordered that the supersedeas bond of the [fol. 12] defendant be and the same is hereby fixed at Seven Hundred and Fifty ($750.00) Dollars, the same to be approved by the Clerk of this Court and to be conditioned to pay the plaintiff in this cause the amount of the judgment with interest and costs if the said judgment should be affirmed by the Appellate Court, and that said Bond shall be filed and approved within thirty days from this date. And

It is further ordered that upon the issuance of a writ of error in this cause from the Supreme Court of Florida to this Court, and the filing and approval of said bond within the time required by law, that the judgment herein be superseded pending proceedings in the said Supreme Court of Florida.

Done and ordered in vacation at Quincy, Gadsden County, Florida, this the 30th day of March, A. D. 1929.

E. C. Love, Judge.

On the 28th day of May, A. D. 1929, after the adjournment of said term, by virtue of a special order to that effect, the defendant made up and tendered its bill of excep-

tions, which, after due notice, was settled and signed by the Judge, which said bill of exceptions is in the words and figures following, to-wit:

[fol. 13] IN CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT OF FLORIDA IN AND FOR GADSDEN COUNTY, SPRING TERM, A. D. 1929

Bill of Exceptions

I, E. C. Love, Judge of the Circuit Court of the Second Judicial Circuit of the State of Florida, do hereby certify that during the progress of the cause pending in said Court, wherein A. W. Watson was plaintiff and Seaboard Air Line Railway Company, a Corporation, was defendant, the following proceedings were had, to-wit:

On the 23 day of March, A. D. 1929, during a term of said Court, the issues joined between the said parties came on to be tried before a jury, and thereupon, to maintain the issues in his behalf, the plaintiff called and caused to be sworn as a witness in his behalf, one LASAW RICHARDSON, who testified as follows:

Direct examination.

By Y. L. Watson:

My name is Lasaw Richardson. I was working for Charley Strong last year. In 1926 I was working for A. W. Watson. I was driving a team of mules for A. W. Watson. The railroad train hit those mules. It killed them. It broke the tongue off the wagon. That happened at Douglas City. That is about seven miles from Quincy. Mr. Long lives right by there. Mr. Douglas used to run that place and they called it Douglas City. The track wasn't very far from the Spanish Trail. (1) It was the evening train that hit it; it was the Seaboard train.

Cross-examination.

By W. J. Oven:

I don't know what time of day the train passed but it [fol. 14] was the evening train coming from that way. It was going toward River Junction. It was in the day time; it hadn't gotten dark. I meant it was the afternoon

train. It was coming from Quincy going toward River Junction. I don't know what time of day it was but it was day time. When the train struck the team I was driving, telling them to get up. I was driving the wagon, I was going that way; when I got to the Spanish Trail I turn and go west and cross the railroad crossing, and when I turned I looked for the train and didn't see it. I was not coming toward Quincy; I was going West. Before I got on the track I was on this side of the track. The railroad runs just like that and I was going that way. I was going from south to the north. (The witness doesn't know the points of the compass there.) I was on the Spanish Trail; I was going to turn on the blind road and get over the railroad. (2) I was going for a load of wood. I was going down in the piney woods. That was on the Greensboro road. Before I turned I was coming from River Junction toward Quincy. Then I turned to my right to cross the railroad. There was some one else there driving; it was Ben Ellis. He was about as far ahead of me as from that bench to me. He wasn't as far as the length of the Court room; he was as far as from that bench right there. He just did make it across. I don't know how many steps he was ahead of my wagon; about as far as from here to that bench. Yes, sir; he was just about a wagon length. I don't know whether or not it could have been a little more; I didn't measure it; it wasn't far apart. When the train struck the team it killed the mules. Yes, sir; the engineer and conductor said something to me. I did not tell the engineer and conductor that when I saw and heard the train coming I tried to get the mules to back off the track but the train struck and killed the mules. I did not sign a statement to that effect. (3) I did not pull on them and stop them right on the track when I saw the train. I didn't have a [fols. 15-17] chance to get off the wagon after I saw the train; it was right on me; I was trying to get across. I didn't see it until it was right on me. I tried to get across if I could. The mules were walking. When I started to cross I looked and seen the train and it was right on me. Before I got to the track I looked for the train and didn't see it and I drove on. And it was right on me before I saw it. When I turned the bend I got up and looked. Before then I had not been laying down; I had been sitting down, and I had a board coming across the body and I got up

and looked each way and couldn't see any train. I couldn't see far down the track on account of a warehouse and high bank. I don't know how far I could see that warehouse and bank; it was a pretty good piece. No, sir; it was nothing like half a mile; it wasn't a quarter of a mile; it wasn't a hundred yards.

Q. Wasn't quite two hundred?
A. Yes, sir.

I did not get out of the wagon. No, sir, my mules didn't have to be exactly right on the track before I could look up it; I could see kinda catty-cornered before I got on it. (4) I did not tell e*ight*- Mr. Lee, the Engineer, or Captain Thomas, the Conductor, that I seen or heard the train coming and tried to back the mules off the crossing, but the train struck them. I did not tell them that.

And thereupon the plaintiff, to further maintain the issues in his behalf, offered himself as a witness, and after being duly sworn was examined and testified as follows:

* * * * * * *

[fol. 18] Thereupon said letter was offered in evidence as Defendant's Exhibit No. 1, without objection, and admitted in evidence, which said letter reads as follows, to-wit:

DEFENDANT'S EX. #1

"A. W. Watson, Dealer in General Merchandise, Gretna, Fla.

45454

Oct. 28, 1926.

Mr. W. A. Hutson, Jacksonville, Fla.

DEAR SIR: You will find enclosed bill for two bay mules killed Oct. 26, weight 2550 pounds, 9 and 10 years old. I purchased one of these mules from Howard Sylvester Co. Quincy, paid $600.00 for this one, and the other one bought from R. E. Blitch, Quincy, and paid $300.00 for her, both mules are mare mules and were of the finest condition and quality for mules. I refer you to Mr. R. E. Blitch of Quincy and Mr. Jack McFarline of Quincy as reference to

these mules, as they are the ones whom I bought these mules from.

Mules were killed at the Aspalago crossing between Gretna and Quincy.

Pelase send me check for $650.00 to cover loss of these mules. Please send me check at once, as I need to replace these mules to finish gathering my crop. Damage to wagon and harness $14.00.

I will appreciate very much an early settlement.

Yours very truly, A. W. Watson."

Stamped as follows: Seaboard Air Line Railway Co. Oct. 28, 1926. Stock Claim Department.

[fol. 19] Redirect examination.

By Mr. Taylor:

That claim was never paid by the Railroad. It was never settled in any way. Nothing was ever paid me for the mules. The dead mules were not worth any thing. The wagon was damages to the amount I put it. If I could say which one of the Seaboard agents—claim or stock agent —I went in and showed him the wagon under the shelter—I don't know his name. No settlement has ever been made of the claim for the wagon.

The Court: That letter states you bought that mule from H. J. Sylvester?

A. McFarlin and Sylvester together, whichever I called them—together.

Q. Mr. McFarlin was in it?

A. Yes, sir.

Testimony of JACK MCFARLIN omitted by stipulation.

[fols. 20-22] And the Plaintiff, to further maintain the issues in his behalf, produces as a witness one R. E. BLITCH, who, being first duly sworn, testified as follows:

Direct examination.

By Mr. Taylor:

My occupation is that of Farmer's supply store—mules and stock. I have been in the business of buying and sell-

ing mules for twenty-three years. I am familiar with the price of mules and have been for that length of time. I sold some mules to Mr. Watson in 1922. I guess I saw those mules off and on from then until 1926. I sold those mules to Mr. Watson in 1928 for six hundred dollars a pair and I think those mules at that time were about five years old, and two years after they were about seven years old and they hadn't depreciated very much and they probably would have been worth three hundred apiece. That was the market value at Quincy at that time. The market value at Douglas City was the same as at Quincy.

[fol. 23] Q. You stated it was about five years old when you sold it?

A. Might have been younger, or a few days older.

From 1922 to 1926 is four years. From February to October would be four, five or six months.

Q. You mean to say you haven't intellogence enough to tell how many months there is in that period of time? Will you count on your fingers and tell us? March would be one, woul*t* it not?

A. Yes, sir.

Q. April would be two?

A. Yes, sir. (12)

A. May would be three, would it not?

The Court: Is it necessary?

Mr. Oven: The witness seems to treat my inquiry as a joke and all I ask as a joke.

The Court: Do you know?

Mr. Oven: State it. You said four, five or six months?

The Witness: About six months is what I said.

The Court: Count it and say.

Witness: It is eight months.

Redirect examination.

By Mr. Taylor:

If the mule was in as good condition in October 1926 as it was the last time I saw it a few months before that, certainly it would be worth the amount I testified it was.

Testimony of A. W. Watson omitted by stipulation.

[fol. 24] Thereupon the plaintiff rested its case.

And thereupon the defendant, to maintain the issues in its behalf, produced as a witness one J. M. Lee, who, being duly sworn, testified as follows:

Direct examination.

By Judge Oven:

My name is J. M. Lee. My occupation is Railroad Engineer. I am with the Seaboard Air Line. I have been employed by the Seaboard Air Line Railway Company as an engineer for six years. I had had experience prior to that in handling the A. B. & A. out of Atlanta. During the six years I was employed by the Seaboard I was on different runs; working the extra board. I have been employed on the Jacksonville,—River Junction run; that has been my main run since I have been with the Seaboard. I was an engineer on the A. B. & A. nineteen years.

[fol. 25] I was engineer on the train of the Seaboard on the day two mules belonging to A. W. Watson were killed on the 26th day of October, 1926, at a public road crossing called the Ashpolaga road. It was train number 37. The train called 37 runs west from Jacksonville to River Junction. It handles passengers. It is a passenger train. It carries Pullmans. Those Pullmans go through on the L. & N. They go from River Junction to Pensacola. The accident occurred about three thirty—three twenty-eight, or something like that. It was in the afternoon. Approaching the crossing—this point, about two hundred yar-s east of this crossing I seen a wagon—two mule wagon—crossing the crossing, and about a hundred and fifty yards or a hundred yards before I got to the crossing another team came on the crossing and about that time the driver discovered there was a train coming and he jerked the reins and the mules stopped right on the crossing and he wasn't able to get the mules away from the crossing, and in approaching this crossing I sounded the steam whistle and the automatic air bell was ringing. The engine was equipped with an automatic air bell, and it was ringing. I was at the Standard Whistle post when I sounded for it. I whistled

again. I hit the wagon I guess between thirty and thirty-five miles an hour. Before that I had been making about forty to forty-five miles an hour maximum speed. I was not operating that engine carelessly. That was the ordinary speed according to the rules and regulations. The engine and train was properly equipped in every way. (15) When I saw the wagon come on the track I made an emergency application of the brakes. The brakes responded. From my experience as an engineer the train could not have been stopped any more quickly. There was no obstruction between me and the crossing for a quarter of a mile. The view was clear. The first wagon got across and the second wagon was just a few *years* behind him in the rear, I guess twenty-five or thirty feet, and one had got across and the other was driving up. It was the second [fol. 26] wagon I struck. When I saw the second wagon I applied my brakes and commenced blowing the whistle again.

Q. State if you failed to do anything you could have done to stop that train?

To which question counsel for plaintiff did then and there object on the ground that it was leading, which objection was by the Court sustained, and to which ruling of the Court the defendant, by its counsel, did then and there except.

Q. State whether or not you did anything in the handling of that engine on that day that you should not have done, that tended to cause the accident.

To which question counsel for plaintiff did then and there object on the ground that it was leading, which objection was by the Court sustained, and to which ruling of the Court the defendant, by its counsel, did then and there except.

The driver of that team could have seen and heard (16) the approaching train—the noise—if he had been watching. I was going west. He came on the track from the north side. He came on from my right. After I got up there and stopped the train the driver said he got on the crossing with the team of mules and seen the approaching train coming and he jerked the reins and couldn't get the

mules to move, and the driver jumped out. He was driving the team in an ordinary walk when he drove up on the track, you know—a team walk. I guess I was about a hundred yards or a hundred and a quarter yards from the second team when I saw it, something like that. The bell was still ringing. I sounded the standard road crossing whistle—two long blasts and two short blasts. I don't know exactly the distance from that whistle board to the crossing, but we commenced blowing the whistle at the whistle board and continued as we approached the crossing. [fol. 27] When the last blast was sounded my engine was practically on the crossing; right at the crossing. That was the blast sounded after I saw the team on the track. After I seen the second wagon come up on the track I commenced giving successive signals—warning signals. I had previously sounded the regular road crossing signal, and after I seen the second team I commenced blowing the whistle in successive sounds. (17)

Cross-examination.

By Mr. Taylor:

I always blow when I pass the blow post out there. I always blow at the blow post. I don't know exactly how far the blow post is from the crossing, something like a quarter of a mile. My run went west to River Junction. I don't know of my own personal knowledge that any of those cars ever left the State of Florida; I know they left that point. My engine stopped at River Junction. Another train was made up before those cars moved on anywhere else; another engine takes them away from there. I couldn't say when was the first time I ever run a train on this run from Jacksonville to River Junction. During the six years I have run every train over there. Every schedule train on the line I have run it. I don't know the first day I went on the Jacksonville-River Junction line. I have been on it ever since I have been here, off and on. On one occasion I had the job eight months, in 1925 I believe it was. I held a regular job for about six or eight months. After that I was taken off and put on a freight train between Tallahassee and Jacksonville and sometimes west here. I was later put on a passenger run on this end. I was not a regular engineer at that time; I was extra man. (18)

Redirect examination.

By Judge Oven:

[fol. 28] I said I was on that run regularly about eight months in 1925. Then I went on a freight engine. I didn't run between Tallahassee and River Junction any on that freight engine at that time; it was a run between Tallahassee and Jacksonville. There is a road crossing signal sign at the approach to this crossing where the accident occurred. That calls for a standard crossing signal. I gave that signal that day in passing. Later I blew short blasts. W. C. Hays was my fireman that day.

And thereupon, to further maintain the issues in its behalf, the defendant called as a witness in its behalf one W. C. Hays, who, being duly sworn, testified as follows:

Direct examination.

By Judge Oven:

My name is W. C. Hays. My occupation is Fireman on the Seaboard. I have been fireman for the Seaboard five and a half years. I have been running on the West End —known as the West End of the South Carolina Division —Jacksonville to River Junction. I was on the train that killed the mules on October 26th, 1926, belonging to A. W. Watson, alleged to have been caused by the negligence in the operation of a train of the Seaboard. (19) That is train thirty-seven. It is the morning passenger train for River Junction, and at that time I think left Jacksonville at eight-ten and due at River Junction at four-fifteen. This accident occurred about three twenty-five; between three-fifteen and three-thirty in the afternoon. I was fireman on the engine at that time. J. M. Lee was engineer. I am familiar with the road crossing there from my travel on the road. The engineer on the train sounded the road crossing signal that day for that crossing. I would say [fol. 29] the train was about three hundred yards from the crossing when the regular road crossing signal was sounded. The bell was also ringing. It was not a bell you ring by hand; we have an automatic bell ringer and

one with the cord, but the automatic was ringin-. Of course, me being the fireman, you see, and going around that curve, I noticed the bell was ringing and the engineer blew the whistle, and I was sitting on the seat box at that time and all at once the engineer applied the brakes and the emergency and you know that is something that hardly occurs except in case of emergency, and I walked over the gangway to see what was on the track and I saw a pair of mules standing on the crossing and about that time a negro man jumped off the wagon and ran and I knew we were going to hit, and I stepped back in front of the boiler. I couldn't see the team from my side of the engine; I had to walk over to the engineer's side. The view was clear on the engineer's side. (2). The engineer put on his emergency brakes. The brakes responded. I think there were seven cars on the train that day. The rea- car stopped about on the crossing. I didn't hear the negro that was driving the mules say any thing; I didn't go back, I had to stay with the engine and didn't hear a word they said. The crossing signal was sounded, and the automatic bell was ringing. He did not blow his whistle again after blowing for the crossing.

Q. Didn't he blow short blasts after he got right close up?

Mr. Taylor: I object to that; he is leading him.

The Court: Try to avoid those leading questions.

Q. State whether or not the engineer gave any signal after seeing the mules?

Q. No, wasn't any to give except to try to stop. He did every thing he could to stop.

The train responded readily to the application of the [fol. 30] brakes. I venture to say the engine was less than a hundred yards from the crossing when the last blast of the engine was sounded. The engine was something like three hundred yards from the crossing when the first blast was sounded; two long blasts and two short.

Cross-examination.

By Mr. Taylor:

Those trains are not supposed to pass that crossing without blowing. (21) I couldn't tell you whether they ever

do it, I don't ride all of them. I never rode one in my life that didn't blow. They blow about three hundred yards from the crossing They do not wait until they get right on the crossing to blow; I never heard one blow right on the crossing in my life. I walked across from my side when he blowed and applied the emergency brakes and I saw the mules and stepped back; I didn't want any thing to hit me from the wagon.

Re-direct examination.

By Judge Oven:

It is the engineer's duty to blow. Air starts the automatic bell to ringing. It does not run all the time; you turn a valve on the bell. On this particular occasion the valve was turned about the time the whistle was being blown. The engineer turned the valve. The cord is on the fireman's side and in the event the air fails to work he can pull the cord.

Thereupon the defendant, to further maintain the issues in its behalf, produced as a witness one BEN JOHNSON, who, being duly sworn, testified as follows:

Direct examination.

By Judge Oven:

[fol. 31] My name is Ben Johnson. My occupation is Train porter. I am train porter for the Seaboard Air line. I have been working for them eighteen years. I was on the train the day two mules belonging to Mr. A. W. Watson were killed out here on the road crossing where the Ashpolaga road crosses the Seaboard West of Quincy. A signal was sounded that day for the road crossing. He blowed two longs and two shorts. The bell was ringing. The emergency brakes were applied that day. They were applied before the mules were struck. He put on the brakes and emergency and stopped right at once. It went about a train length from the time the brakes were put on until it came to a dead stop. It went about a train length.

Cross-examination.

By Mr. Taylor:

I don't know that the train was going twenty miles an hour when that happened. I couldn't tell exactly how fast the train was running; I was inside. I don't know how fast it usually runs when it turns that corner, about thirty or thirty-five. I was in the colored car when the train blew for that crossing; the first car from the baggage car. There were seven cars on that train. I heard the whistle and heard the bell. I have been on the road seventeen years. The train I am on always blows when it comes to that crossing. (23) I run on that line every day. I know it blows at all road crossings when I am on there. I never heard it miss. Yes, sir; I pay attention every time the train blows or the bell rings; blow for station or road crossing. I remember it blowed the crossing that day. No, sir; I don't know about it blowing for that other crossing at Mount Pleasant; I know it blowed; I know it blowed that crossing. Time I heard it was not the Mount Pleasant crossing. It was the eight hundred and twenty-six and a half mile post. I don't know what the road crossing is [fol. 32] going down to Hardaway; I don't pay no attention to that. The train blowed for all road crossings; it blows for all of them. It was about three-twenty-eight when the train passed that crossing. I don't know what the schedule time is for the crossing. Sure I was on this train the day before this accident happened; I was going to Jacksonville the day before it happened. Yes, I can swear the train blew that crossing the day before it happened when I was on the train going back the other way. It always blows for a road crossing. I know it blowed that day. (24)

Thereupon the defendant, to further maintain the issues in its behalf, produced as a witness one J. L. Thomas, who, being duly sworn, testified as follows:

Direct examination.

By Judge Oven:

My name is J. L. Thomas. I am Train Conductor for the Seaboard Air Line. I have been a conductor for the

Seaboard Air line about thirty-five years. During that time I have had experience in operating trains between Tallahassee and River Junction. I am familiar with that road. I have been constantly connected as Conductor for about thirty-five years for the Seaboard. I was conductor on the train the day two mules belonging to Mr. A. W. Watson were killed at the Ashpolaga road crossing west of Quincy. Mr. Lee was engineer on the train that day. Ben Johnson was my porter on that day. Hays was Mr. Lee's fireman. That train was number 37. Number 37 is the train from Jacksonville to River Junction. It is a passenger train. That train hauls and handles passengers, mail and express. The Seaboard is from Jacksonville to River Junction, and it is taken from there by the L. & N. [fol. 33] It handles Pullmans. I think they go to New Orleans. It handles mail. I guess it goes everywhere; west of River Junction. It handles express. The express messengers run through to Pensacola; I think they have another change of messengers there. (25) I don't know about the express, but train number 37 handles passengers who go beyond the limits of the State—that is, the connection handles passengers. These passengers when I handle them for the Seaboard are in the day coach and sleepers. The sleepers go to New Orleans. I expect we had about seven cars in the train that day, but I can't be positive. That is about our usual shipment. I recall this accident. It occurred about three thirty—close to three twenty-five or three thirty—somewheres in there. I know the crossing signal was sounded before reaching this crossing. I heard it. I cannot say the bell was ringing; I couldn't hear that three or four cars back. I am not personally positive about that. I am positive the crossing signal was blown. My recollection is that the whistle was being sounded as the brakes were applied in emergency. The brakes were applied. They responded very promptly. I think we had seven cars and the rear car was still on the crossing when it stopped. In my judgment as a conductor I don't think the train could have been stopped any sooner. (26) We were making about thirty-five or thirty-eight miles an hour. That was the regular speed there. We could have run faster but we were about on time that day. On the part of the conductor and as a railroad man I will say I don't think there was any thing could have been done to

avoid this accident. There was no defective equipment about the train in any way. There was no negligent handling of the train in any way. I got out after the accident. I seen quite a number of people there. I had a conversation with the man driving the team. He said he wasn't paying much attention and didn't realize the train was [fol. 34] coming until he got right on the track and then he halted his mules and attempted to back them off the track. His name was Lasaw Richardson. Lasaw Richardson was there when Ben Ellis, the driver of another team, made a statement to me. I took a signed statement from Ben Ellis, another driver. (27)

Cross-examination.

By Mr. Taylor:

At the time of the accident I had been on this run from River Junction to Jacksonville a couple of years. I went as far west as River Junction. I don't go farther west than River Junction. I know of my own personal knowledge that some of those cars were scheduled to cross the State line. I don't follow the cars. I don't know that they carried out the schedule. No, the train wasn't going as fast as it could. I have never known that train to fail to blow at that crossing. I have different engineers to make that run.

Q. Did you run the same train every time, or did you change about from time to time as you are assigned?

A. When we are on this run we run on the same train.

We do not have the same engineer. I don't know now now long Mr. Lee had been operating my train. He was an extra engineer. He wasn't the regular assigned engineer, my recollection is at this time. He was the regularly assigned engineer for awhile, but where traffic arrangements bring about changes from time to time they change crews.

Re-direct examination.

By Judge Oven:

I got out there after the train was stopped. I understood this road that cross- the railroad to be a regular

highway, one of the main highways. (28) I couldn't say now whether it was a County or State Highway. I sup-
[fol. 35] pose it was a State highway. No, I suppose it is a County highway. The main State highway, I understand, is farther north. I wouldn't like to say. I couldn't say whether or not this road runs into the State highway. I operate between Jacksonville and River Junction.

Q. State as a matter of fact, if you know whether or not there is any bus competition with the railroad service as between Jacksonville and River Junction and intermediate points?

Mr. Taylor: We object to that. It is grossly immaterial.
The Court: I can't see the purpose or object.
Mr. Oven: The purpose is to ultimately raise the question of the application of the Statute being unconstitutional in that it places a burden on defendant, applies a rule of law against the defendant and that it does not apply to bus lines in direct competition with defendant.
The Court: Go ahead and answer, I reserve ruling on it.

Witness: I know there is competition between Jacksonville and Tallahassee, and I don't know personally but I have been informed that there was competition between Tallahassee and Pensacola.
I would consider the view of the track very clear. I don't think there was anything there other than a tree standing off a little distance, but not close to the track or highway. The condition of the track was such that I could see the train approaching from the east going west at that crossing.

Re-cross.

Mr. Taylor:

There is a siding known as Douglas Siding some little distance from that crossing. There is a warehouse at that siding. There is a little cut approaching that crossing but I
[fol. 36] wouldn't consider that an obstruction of the view. (29) If you were back of the warehouse it would obstruct the view but after you pass it I wouldn't think it was an obstruction. There might have been some growth of underbush along the railroad just off the right of way. Couldn't say there was, and couldn't say there wasn't. I

don't know that the Seaboard owns the bus line, or a large interest in it, from Tallahassee to Jacksonville. A ticket bought on the Seaboard from Tallahassee to Jacksonville is good on that bus line; and it was before the Seaboard had any connection with it. I don't know whether the Seaboard has some connection with the bus line. I don't know that it's all in the family.

2nd redirect.

By Judge Oven:

Judge, I think it must be maybe three or four or five hundred yards that you can see the train approaching looking from the crossing toward Quincy. From my experience as a train coûductor I would say that a person could hear the noise of a train consisting of *sic*, seven or eight cars approaching for a quarter of a mile.

2nd recross.

By Mr. Taylor:

I don't know whether there was any bus line from Tallahassee to Jacksonville in 1926. (30)

Q. Well, Captain, about this mean hearing the train without the whistle, if the wind was blowing from the man toward the train he couldn't hear it near so far?
A. Well, naturally the wind would take the noise from him.

Judge Oven:

Q. Was any wind blowing that day?
A. I don't think so. Mild day.

[fol. 37] Thereupon the Defendant, to further maintain the issues in its behalf, produced as a witness one Mrs. D. K. Kelly, who, being duly sworn, testified as follows:

Direct examination.

Judge Oven:

My name is Mrs. D. K. Kelly. I live in Gadsden County, Quincy, Florida. I remember about the accident which

occurred at the Ashpolaga road crossing on the 26th of October, 1926. I was at Mrs. J. E. Gatlin's at the time it happened. That was not far from the crossing, I don't know how far; short distance. I saw the accident. I saw it just as the train got to it and hit him. The train blew before the wagon was struck. I didn't notice what kind of signal it was, but when the train I got up and went out on Mrs. Gatlin's porch and saw the train. I saw the team coming down the road, and saw the train approaching it. The driver didn't seem to be noticing the train; he seemed to be unconcerned when the train first blew. The bell on the engine was ringing before the train stopped. (31) I don't know when the driver first appeared to see the train; I couldn't tell you that, because I didn't notice exactly. When I got up and went out the train was coming and I looked around for my boy and found him and stood there a few minutes and the mule team was coming, and when I turned to go back in the house I heard the screech of the brakes on the train and I looked back and the colored man had the mules reared back that way, and about the time the train struck him he jumped. When I mean by "reared back," he had the mules reared back with the collars up to their head. He was trying to stop them. He never did stop them up to that time. The whistle blew more than one time. It blowed about twice. It continued blowing the second time and then stopped. It sounded the regular signal and then stopped, and then started to sounding again. I am not employed in any way by the Railroad Company. My [fol. 38] husband is not employed by the Railroad Company.

Cross-examination.

Mr. Taylor:

Q. Have you any men-folks employed by the Railroad?
A. Kelly.
Q. What kin is he to you?
A. Kin to my husband. (32)
Q. What kin to your husband?
A. You will have to ask him.
Q. How many brothers has your husband got?
A. That hasn't anything to do with this.

I don't know how fast the train was running. I didn't pay any mind. I visit Mrs. Gatlin pretty often; I was up there that day. I don't know how long it was between the first time the train blew and the time the accident occurred. I don't know how many minutes it was; couldn't tell you. My boy was out in front of the house. I didn't have my back to him when the accident happened, I was looking at him when it happened. I said I turned around and looked back and the train got the mules. I don't know how far up from the crossing the train blew the first time. I don't know whether or not it was fifty yards. I don't know where it was.

Thereupon the Defendant, to further maintain the issues in its behalf, produced as a witness one P. H. THARPE, who, having been first duly sworn, testified as follows:

Direct examination.

By Judge Oven:

My name is P. H. Tharpe. I am farming down here by Parramore. I live in Gadsden County. I am not employed by or connected with the Seaboard Air Line Railroad in any way. (33) Yes, sir, I guess I remember about [fol. 39] the accident on the 26th of October, 1926 when two mules were killed at the Ashpolaga crossing. I was there when it occurred. Well, me and Orlando Tharpe, A. W. Tharpe, was walking along coming to the Poplan Mill, coming to work and we was walking along the road and we saw two wagons crossing the railroad and we looked down the railroad track and saw the smoke of the train and pretty soon she began to blow for the crossing, and one made it on across, and I mentioned to A. W. Tharpe, "Look at them fools," and the hind one looked down the track toward the train and he thought he could make it over too, and he kinda slashed the mules with his lines and the mules jumped on behind the others, and he wasn't close enough to make it across and when the train got close he thought he could stop, and he tried to back back and they couldn't stop, and the mules got their feet on the track and the fellow driving the mules saw he was too late

and he turned the lines loose and dashed out the back end of the wagon. He tried to back them off after he seen he couldn't do anything else. I didn't pay any attention at all to the bell of the train ringing. I heard it blow for the crossing. The darkey appeared to stop and look for the train and yet he appeared to think he could make it over, and the train was too close and he saw he couldn't and he run out the back end of the wagon. It seemed that he tried to beat it across and saw he couldn't and stopped. When he got the mules on the track he stopped. I don't think he stopped perfectly still, but they were practically stopped. They wasn't exactly stopped in a perfect stop before he decided to go across. (34) Then he came to a dead stop. I wasn't going in the same direction the wagons were going. I was meeting the wagons and I was on one side of the track and they were meeting me. The train was going toward River Junction, and I was coming toward Quincy. The two mule teams were crossing the track going towards the other way. They were going towards Greensboro—from Quincy. When the first wagon [fol. 40] rolled over I was something like a hundred to a hundred and fifty yards. I was between a hundred, between fifty and a hundred yards of the track when the second one rolled up to the train.

Cross-examination.

By Mr. Taylor:

I live in Gadsden County at Wetumpka. I have lived there two years. I don't know what time of day this happened, but something like the middle of the afternoon, I suppose.

Q. You *saw* the boy saw the train coming and tried to cross ahead of it?

A. He looked towards it.

Q. He did pull the mules down and look both ways?

A. He tried to slow them down and stop them out there.

They were in a jog-trot like any other mules. So he seen he couldn't do that and got up to the track and stopped. (35) No, sir; he didn't come to a stop when he looked both ways before he came on the track; he tried

to stop and didn't stop, and throwed the lines to the mules and thought he could make it. I just imagine that he thought he could make it. The mules were in a jog—in a trot. They were not walking. When the accident happened I waited for the train to get out of the way and come on across the track. Me and this boy come on across and asked this darkey was he hurt, and the darkey said he was hurt, and we seen the wagon torn up and the mules laying there. I work at Poplar Mills. I don't work there now. I am farming at Wetumpka. I was walking along the road when I first saw the teams. One team was behind the other. I was coming toward Quincy. I reckon that is the Ashpolaga road; It aint the Spanish Trail. I was down below there. The first mule and wagon was nearer to me than the one that got hit. (36) I don't know exactly how far apart the wagons were; they was kinda behind one another. I never actually noticed how far behind each other they was. The first wagon come across ahead. I was a hundred and fifty yards away. The sec- [fol. 41] ond wagon got hit. The first wagon wasn't between me and the second wagon; the road come sorter angling this way, and the crossing come like that, and the first wagon come across and stopped. The first wagon stopped before the second wagon was hit. I don't know what it was waiting for.

Redirect examination.

By Judge Oven:

I don't know whether or not the darkey in the first wagon hollered to the darkey in the second wagon. The fact of the first wagon crossing did not break my view of the crossing or the train; I could see both wagons.

Thereupon the Defendant, to further maintain the issues in its behalf, produced as a witness one A. W. THARPE, who, being duly sworn, testified as follows:

Direct examination.

By Judge Oven:

My name is A. W. Tharpe. I live back down here at Wetumpka about twelve miles. I live in Gadsden County,

Florida. I am not employed by the Seaboard Air Line Railway in any way that I know of. I have no interest in the Company at all. (37) Yes, I know about the accident that occurred on the 26th day of October, 1926, when two mules were killed; I was standing pretty close to the railroad when it was done. I saw it. I guess it was about four o'clock when it happened. It was out at what they call Douglas Siding. It was at the road crossing there. I saw the wagons when they started across the road, and the train happened along and it blowed and he kept coming and didn't stop his mules at all, and then stopped and tried to back them off and couldn't do it. I saw the train coming. I heard the train blow before it got to the cross-[fol. 42] ing. I didn't pay any attention to the bell ringing. There were two wagons. It was the second wagon that collided with the train. Mr. Tharpe and I was coming toward Quincy and the wagons was going in the direction from which we was coming. We were coming towards town, and the teams were coming from town. To cross the railroad they would have to turn to the left. (38) I don't know how far the front team was ahead of the rear team; something about fifty year-s, something like that. I didn't see any thing only I seen the train knock the team from the track. The driver didn't stop before he got to the track; he tried to make it on across and seen he couldn't make it and stopped when he got on the track and tried to back off. Then the train hit him.

Cross-examination.

By Mr. Taylor:

At the time I think I was working down with Mr. Robert ——. Now I am working at Jackson Bluff. I was not going to work at that time. I sure couldn't tell you what day of the week it was. I was somewhere about a hundred yards from the railroad crossing when this accident happened. No, sir; I wasn't at the first wagon when it happened; I was close enough to see it. I was somewhere about fifty yards from the first wagon when this happened, something like that. The mules were trotting. Both wagons were trotting. The driver of the wagon which got hit didn't pull the mules up and stand up in the wagon and look both ways before he got hit; he never did

take up the mules until he got to the railroad. He was looking both ways when he was trying to stop. (39) The train blew before it hit the wagon. It was not right at the wagon; I couldn't tell you how much time—it wasn't over two minutes and a half between the time the whistle blew and the wagon got hit; something like that. I don't know how far the wagon was from the track when the [fol. 43] whistle blew. As near as I can get at it, it was somewhere about thirty or forty yards from the track when the whistle blowed. He tried to stop the mules and back them off, but couldn't back them off. He trotted right on up on the track and stopped them on the track and tried to back them off the track. The first wagon was on the other side of the railroad when the second wagon got hit. It had stopped, I think, I didn't pay any attention to the first wagon much, I was noticing the one that got hit. I think the first wagon was stopped. He had trotted across the track. And the second wagon trotted up on the track.

Q. Then the engineer is wrong when he said it walked up on the track?

(No answer.)

The wagons were not a hundred yards apart when it happened. I said they were about fifty yards apart. (40) I was about fifty yards beyond the first wagon. I wasn't a hundred and fifty yards from the crossing when the accident happened. It was not a bit over a hundred yards.

Q. Then your brother is wrong when he says it was a hundred and fifty?

A. Wasn't a bit over a hundred yards.

I haven't been talking to anybody about this case. I never mentioned it to a soul. I don't know how come the Railroad had me summoned up here.

Redirect examination.

By Judge Oven:

The day the accident happened I made a statement of it to the Conductor. He wrote it down; I don't think I signed it, I might have. I made a statement to him. Me and my brother were going along there together. I sure

didn't measure the distance. My opinion about the distance is just my idea. The whistle blowing first attracted my attention to the train. I could see it coming. The fact that the train was coming and that the teams were close interested me to the extent that I watched it from [fol. 44] then on to the accident. (41)

Recross-examination.

By Mr. Watson:

I saw the train before I saw the wagon on the track. The first thing that attracted my attention was the whistle blowing. The accident was immediately afterwards. It blowed a crossing blow. I don't know whether I can tell you what a crossing blow is. It was right at the crossing. I didn't see the mules right on the track; pretty soon after they got on there. I don't know how far they were from there when they blowed; I didn't measure it.

Redirect examination.

By Judge Oven:

If the team had stopped when I heard the whistle blow the train would not have struck it. After I first heard it blow, the train did not blow any more. I think it blew more than one blast; I aint sure. I didn't count it. The team that got struck was about fifty yards from the railway when I first heard the whistle. The train was something about a hundred yards from the crossing when I first heard the whistle. (42)

Recross-examination.

By Mr. Taylor:

I said the man was looking both ways when he approached the track. He was looking after the whistle blew. I couldn't tell you how fast the train was going. It was going tolerable fast. The mules were going in a pretty fast trot.

Thereupon, to further maintain the issues in its behalf, the defendant produced as a witness one T. N. Cumby, who, being duly sworn, testified as follows:

Direct examination.

By Judge Oven:

[fol. 45] My name is T. M. Cumby. I work at the City Drug Store. I have been working there about three and a half years. The City Drug Store is in Quincy, Florida. They sell tickets there on the bus.

Mr. Taylor: We object to that; it is immaterial and irrelevant.

The Court: I will see whether it is or not.

Mr. Campbell: The question should be whether they sold tickets for the bus in 1926, and not now.

I couldn't say for sure whether we were selling tickets on the bus as far back as October, 1926, or not; it's been two to two and a half years.

Q. Was the bus operating between here and Marianna then?

Mr. Taylor: Object to that. He hasn't shown that it was at the time this accident occurred.

The Court: Go ahead, subject to a motion to strike.

A. At that time?

The Court: What time?

Judge Oven: About two and a half years ago?

Witness: It was if we were selling tickets at that time. (43)

(Witness:) I don't know when we began selling tickets. I think I could find a record that would disclose it. I might examine the records and find if we were selling tickets on the 26th of October, 1926.

Judge Oven: I ask leave to connect that up.

(Witness excused to ascertain the information.)

Thereupon the defendant rested its case, subject to the testimony of the witness.

[fol. 46] And thereupon, the Defendant having rested its case, the Plaintiff, to further maintain the issues in his own behalf, produced as a witness in rebuttal one Joe

WOODBERRY, who, having been duly sworn, testified as follows:

Direct examination.

By Mr. Taylor:

My name is Joe Woodberry. I live out here at Douglas City, four miles from town. The Ashpolaga road runs in front of my house. I remember the occasion when a couple of mules belonging to Mr. A. W. Watson were killed out there at a crossing. I wasn't a quarter of a mile from the crossing when the accident happened—I was less than that, on one side of the field, across a five acre field. My field was right up to the railroad. I could see and hear plainly that train coming there. That train did not blow at the post out there. I reckon it was fifty yards from the crossing when it did blow. It was going thirty or forty miles an hour when it blew. (44) It didn't blow until it was right on the crossing.

Q. Would a man with a team of mules just starting across the crossing have time to get across after it blowed, before the train hit him?

To which question counsel for the defendant did then and there object, on the ground the witness was not qualified as an expert; which objection was by the Court overruled, and to which ruling the defendant by its counsel did then and there note an exception.

Q. You live there?
A. Yes, sir.
Q. Do trains always blow at that crossing?

To which question counsel for defendant did then and there object, on the ground that it was immaterial and irrelevant; which objection was by the Court overruled, and to which ruling of the Court the defendant by its counsel did then and there except.

[fol. 47] They blow at the crossing but not at the blow post. Lots of times the engine is right on the crossing before they make their blow. They blow so close to the crossing it would be impossible to get off the crossing after they blow.

Cross-examination.

By W. J. Oven:

It is a fact that the crossing signals consist of two long blows and two short blows.

Q. Then, if the train was running pretty fast and blew that signal wouldn't that bring the train pretty close up to the crossing?

A. If they blowed the post the first time, but they are half the length of the train from the post before they blow. I know often the train has gotten a length and a half this side of the blow post before they ever blow the whistle.

On this particular day I was in the field planting some beans—in sight of the railroad. I was closer to the blow post than I was to the crossing. (45) I was about even with the blow post. I say the train sounded the whistle after it passed the blow post. I could not see the crossing from where I was. I could see the last coaches of the train about the time the engine got on the crossing, and then it went behind the tobacco barn and after that I couldn't see any more. It blowed after that. I don't know where the team was when the whistle sounded; I couldn't see the crossing or the team, and I just heard the crash and what made me pay attention to it, I thought maybe it was time for the school children to come by, and I taken my watch out and seen it wasn't time and I wasn't interested, and I just thought something had happened and I didn't know any more until I got home that night. I didn't see the accident, but I did see the train. From where the train went behind the barn it was about even with a peach orchard of mine and was about fifty or sixty yards—over twice the length of the train—from the [fol. 48] blow post when it first started to blow.

Q. Were you watching the engine when it passed?

A. Always you have people there in the field and you have mules afraid of it, and you try to stay away from the end of the rows to keep the mules away.

I didn't follow it all the way down with my eyes, but I know the train blowed and I heard the crash right at the crossing. I didn't have my mind specially on the

whistle, but I know there wasn't no blowing until it got up there. I was looking right at the train when it was running on down there. (46) The train was making a little fuss running along. It made a good deal of fuss where I was, and you can hear it half a mile from there according to the way the wind is blowing. I don't remember about whether we had any wind that day or not.

Thereupon T. M. CUMBY, a witness for the defendant who was excused to make search of the records, was recalled at this point and testified as follows:

Direct examination.

By W. J. Oven:

From my investigation I find that the Bus started in September or October, 1927. I don't know whether the Bus was operating in 1926 or not. We sold tickets on the first day it came out.

Thereupon the Plaintiff to further maintain the issues in his behalf, produced as a witness in rebuttal one CHARLIE HAYS who, being duly sworn, testified as follows:

Direct examination.

By Mr. Taylor:

My name is Charles Hayes. I remember the day some [fol. 49] mules got killed out there. (47) I was out in the field plowing. That train was right there at Mr. Joe's when it blowed for the crossing, about a hundred year-s, I guess. I heard the train hit something; I didn't know whether it was mules. The train blowed and said "toot, toot, toot" and it hit something and I didn't see any thing. The "tooting" and the hitting was about the same time. They were right together. That was the first time the train blowed.

Cross-examination.

By W. J. Oven:

I said the train was about a hundred yards from the crossing when it first blowed. I am sure of that. How

come I to know it, I see'd how the thing was. I didn't measure it but when I judged about it. It was a hundred yards from the crossing. I don't know about whether it could have been more. How come me to see the train that day, I heard it blow. When it said "toot, toot" I was over in the field planting beans, and I said "look out, school children," and Mr. Joe pulled out his watch and said, "look out." I didn't measure the distance it was from the crossing when it said "toot, toot." We were planting beans.

Thereupon the plaintiff, to further maintain the issues in its behalf, produced as a witness one DAVE DOUGLAS, who, being duly sworn, testified as follows: (48)

Cross-examination.

By Mr. Taylor:

My name is Dave Douglas. I live four miles from Quincy on the old Spanish Trail. I suppose I live a quarter of a mile from where the Ashpolaga road leaves the Spanish Trail. That is my living place; I really haven't any place of business. I see the Seaboard trains pass through there.

[fol. 50] Q. Do these trains always blow for that crossing?

To which question the defendant by its counsel did then and there object, on the ground that it was immaterial and irrelevant and is not confined to the time in question; which objection was by the Court overruled, and to which ruling of the Court the defendant, by its counsel, did then and there except.

In my experience I don't know that I have ever known the trains to run by there when I noticed it, but I have once or twice in twenty-one and a half years I have noticed that the trains do not blow. Only once or twice and only very seldom.

Judge Oven: I move to strike the testimony of the witness.

The Court: I don't think that is proper testimony. You will disregard the statements of Mr. Douglas as not pertinent to the case, Gentlemen of the Jury.

Thereupon the plaintiff, to further maintain the issues in his behalf, produced as a witness one Ed Jones, who, having been duly sworn, testified as follows (49)

Direct examination.

Mr. Taylor:

My name is Ed Jones. I live out to Mr. Kelly's, about four and a half miles from here. I was out near Douglas City at the time the train killed Mr. Watson's mules. I saw the train when it was going along that day. I couldn't tell you how close I was to it, but I worked for Mr. Woodberry at the time and he had us on a job, and I heard the train blow right short and quick, and I asked Mr. Woodberry, "I wonder if it hit the school children." We was in the shade and it seemed to be fifty or sixty yards from where we was when it blew and shortly after that we heard [fol. 51] a rumbling up near the railroad crossing. I know where the blow post is; I don't know exactly how far it was from the blow post when it blowed. I know where the blow post it. If the train blowed there I didn't pay any attention to it. I heard it blow twice right short.

Cross-examination.

By W. J. Oven:

We were fixing to plant some vegetables for Mr. Woodberry when this happened. Me and Charley Hays and Mr. Woodberry were out there. I couldn't tell you exactly how far we were from the railroad. (50) I heard the train blow twice and I spoke about the school children. Then I heard a rumbling and I spoke about the school children, and he pulled out his watch and said, "it aint time for the school children.

Thereupon the plaintiff rested its case.
Thereupon the defendant rested its case.

CHARGE TO JURY

And thereupon the Court charged the jury in the following words, to-wit:

Gentlemen of the jury, in this case the plaintiff, A. W. Watson, sues the defendant, Seaboard Air Line Railway Company, a Corporation, in an action to recover damages alleged to have been sustained by the plaintiff by reason of the negligent act and conduct of the defendant. In this declaration setting out the cause of action, the plaintiff alleges in substance that on the 26th day of October, 1926, in Gadsden County, Florida, the defendant Railway Company caused the death of two mules and damage to a wagon, the property of the plaintiff, at a railroad crossing, the place where the Ashpolaga road in this County crosses the defendant's railroad, and that such damage was caused by the negligence of the defendant company [fol. 52] in that it failed to use reasonable,—failed to give warning and notice by the blowing of the whistle or otherwise of the approach of said train, and as a direct cause thereof the said damage was done.

To this declaration the defendant has filed several pleas; one, the first, being not guilty. This plea denies the wrongful act or the breach of duty on the part of the defendant, and imposes upon the plaintiff the burden of proving that the damage incurred was done and was the result of the alleged negligence of the defendant.

There are three other pleas; the first plea in substance sets up a defense that the plaintiff's agent or servant failed to stop, look at said railroad crossing to determine whether or not the train was then and there approaching, and that by reason of such failure so to do the alleged accident or damage was caused solely by said failure on the part of the plaintiff's servant.

The third plea in substance alleges that the defendant's servant driving the team alleged to have been damaged here, that he was negligent and careless in so doing, that he failed to stop, look and listen for the approach of the train, and that the location or use of the track and the approximate time of the passing of the defendant's train thereover during the day was then known to said servant, and that said injury and damage sustained by the plaintiff was caused solely by the negligence of the servant of

the plaintiff by failing to use reasonable and ordinary care in crossing said track, and that thereby the plaintiff is barred from recovery regardless of the alleged failure of the defendant to give warning or notice by blowing the whistle or otherwise of the approach of said train.

The next count is that the servant by such neglect to stop, look and listen at said crossing was negligent and thereby contributed to the damage sustained; and the fourth plea is to the effect that the damage, if suffered, was [fol. 53] contributed to by the negligence and carelessness of the defendant's servant in driving said team when approaching the track of the defendant, in that he failed to observe and use reasonable and ordinary care to observe whether or not the train of the defendant was approaching said crossing.

Gentlemen of the jury, I charge you that the standard of conduct on the part of a person approaching a railroad crossing to be applied in actions to recover for damages sustained by collision with a train at a railroad crossing is that when a person drives upon the railroad track the driver of a vehicle must be sure whether a train is approaching, and if the driver of a vehicle cannot be sure otherwise whether a train is dangerously near, he must stop and get out of his vehicle. If he can otherwise assure himself whether or not a train is approaching by stopping, obviously he is not required to get out of the vehicle to observe whether or not such train is approaching a crossing.

Now, this is the duty imposed upon a person crossing a railroad track at a public crossing driving a vehicle thereon. But it does not go to the standard of the duty imposed by our law upon a railroad company, or define the liability of such company under our Statute. Our Statute provides that a railroad company shall be liable for any damage done to stock or property of another by the running of locomotives or cars unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence,—the presumption in all cases being against the Company.

I further charge you that no person shall recover damages from a railroad company for injury to his property caused by his own negligence, or the negligence of his agents or employees. If the plaintiff and the agents of

the company, or if the servants of the plaintiff and the agents of the company, are both at fault, then the plaintiff [fol. 54] may recover, but the damages shall be diminished or increased in proportion to the amount of fault attributed to him. Therefore, although the standard of care and duty required by the law of persons in crossing railroad tracks is such as I have stated and should be applied in this case, yet, if you find from the evidence that the damage alleged was caused by the running of the defendant's railroad locomotive and train of cars on its tracks there may be a recovery for the damage done, unless the defendant company shall make it appear by a preponderance of the evidence that its employees exercised all ordinary and reasonable care and diligence in the premises. But if it appears that the injury was caused solely by the negligence of the servant of the plaintiff driving said team upon said track, there can be no recovery in this case. And if both the servant of the plaintiff and the employees of the railroad company were at fault in causing the damage alleged, there may be a recovery, but the damages should be reduced in proportion to the contributory negligence of the plaintiff's servant.

If you believe from the evidence in this case that in Gadsden County, Florida, in October 1926, the defendant's locomotive and train of cars ran upon and against the two mules and wagon of the plaintiff as alleged in the declaration, at a point where the Ashpolaga Road crosses the railroad track of the defen-ant company, and that at the time of such accident the defendant company's employees or agent did not use reasonable and proper care in the operation of said locomotive and train of cars, and did not give warning of the approach of said locomotive and train of cars, then you should find for the plaintiff; unless the defendant company has made it appear by a preponderance of the evidence that its agents and employees used due care—all ordinary and reasonable care and diligence in the operation of said locomotive and train. And if you believe, however, that the damage alleged was caused solely by the failure of the servant of the plaintiff in this case to stop, [fol. 55] look and listen in driving the team when he was approaching the track of the company at the crossing alleged, then you should find for the defendant. If, however, you find from the evidence in this case that the dam-

age alleged was caused jointly by the alleged negligence of the agent of the defendant company and contributed to by the alleged negligence and failure of the servant of the plaintiff, then you may still find for the plaintiff in this case, but his damage should be diminished in proportion to the contributory act of his servant.

The defendant has asked for several special charges. The first I give slightly modified. I refuse it as requested, but give it as modified.

1. The presumption of negligence cast upon railroads by our Statute in personal injury cases ceases when the railroad company has made it appear by a preponderance of the evidence that its agents have exercised all ordinary and reasonable care and diligence. In the presence of such proof by the railroad company the jury do not take any such presumption with them to the jury room in weighing the evidence and in coming to a determination. The Statute does not create such a presumption as will outweigh proofs, or that will require any greater or stronger or more convincing proofs to remove it.

Thereupon, the defendant requested the Court to give the following charge to the jury:

2. I charge you as a matter of law that the standare of care required of a person in crossing a railroad track to be applied in actions to recover damages for injuries sustained by collision with a train at a railroad crossing is that when a person drives upon a railroad track, he knows that he goes to a place where he will be killed or sustain damage if a train comes upon him before clearing the track. He knows he must stop for the train, not the train stop for him. On such circumstances, if a driver of a [fol. 56] vehicle cannot be sure otherwise whether a train is dangerously near, he must stop and get out of his vehicle (although, obviously he will not often be required to do more than to stop and to look) and if you find from the evidence that the driver of plaintiff's vehicle could by the application of such standard of care have avoided the injury, but that he failed to stop and look for the approach of the train, then I charge you that the plaintiff, because of such negligence of the driver of the vehicle and team, is barred of recovery and your verdict should be for the defendant.

Which said charge so requested by the defendant was refused by the Court, and to which ruling of the Court the defendant then and there excepted.

Thereupon, the Defendant requested the Court to give the following charge:

3. I charge you as a matter of law that the standard of care required of a person in crossing a railroad track to be applied in actions to recover damages for injuries sustained by collision with a train at a railroad crossing, is that when a person drives upon a railroad track he knows that he goes to a place where he will be killed or sustain damage if a train comes upon him before clearing the track; he know*n* he must stop for the train, not the train stop for him. In such circumstances, if a driver of a vehi*v*le cannot be sure otherwise whether a train is dangerously near, he must stop and get out of his vehicle, although obviously he will not often be required to do more than to stop and to look; and if you find from the evidence that the driver of the plaintiff could, by the application of such standard of care, have avoided the injury but that he failed to stop and look for the approach of the train, then I charge you that if you find from the evidence in this case that the employees of the defendant used all ordinary and reasonable care under the circumstances in the operation of the defendant's train, then the plaintiff is chargeable [fol. 57] with the negligence of his servant, the driver, and the plaintiff would be barred from recovery and your verdict should be for the defendant.

Which said charge so requested by the defendant was refused by the Court, and to which refusal of the Court to give said charge, the defendant did then and there except.

The Court thereupon concluded his general charge to the jury as follows, to-wit:

You are the judges of the weight of the evidence and the credibility of the witnesses, and if there is any conflict in the evidence, or apparent conflict, then it is your duty to reconcile such testimony upon the theory that each witness has testified to the truth, if you can; but if you are unable to do this, then you are privileged to discard such parts of the testimony as you deem unworthy of belief.

Should you find for the plaintiff in this case, then you should determine from the evidence the amount of damage that he has sustained. If the damage sustained was contributed to by the servant of the plaintiff, and you should find that the defendant's agents were negligent as alleged, then you should diminish the amount of damage suffered in proportion as it was contributed to by the negligence of the plaintiff's servant in the driving upon said tracks at the crossing.

It is necessary that each and all of us should concur and agree upon any verdict, whether for the plaintiff or defendant, before you return the same into this Court.

Should you find for the plaintiff the form of your verdict should be; We the jury find for the plaintiff and assess his damages in the sum of black dollars, so say we all, and let your foreman sign it; inserting the amount of damages according to my instructions.

Should you find for the defendant the form of your [fol. 58] verdict should be: We the jury find the defendant not guilty, so say we all, and let your foreman sign it.

The forms of verdict submitted, you can use that form or either one.

The said cause having been submitted to the jury by the Court under its charges, and the jury having rendered a verdict for the plaintiff and assessed his damages in the sum of Five hundred sixty-four ($564.00) Dollars, against the defendant, on the 22nd day of March, A.D. 1929, at the term of the Court aforesaid, the defendant made and submitted the following motion for a new trial, to-wit:

IN CIRCUIT COURT OF GADSDEN COUNTY

[Title omitted]

MOTION FOR NEW TRIAL

Now comes the defendant by its attorneys and moves the Court to set aside the verdict in the above stated cause and grant a new trial upon the following grounds, to-wit:

1. That the verdict is contrary to law.

2. The verdict is contrary to the evidence.

3. The verdict is contrary to the law and the evidence.

4. The verdict is grossly excessive under the evidence submitted.

5. The Court erred in charging the jury as follows:

[fol. 59] "Now this is the duty imposed upon a person crossing a railroad track at a public crossing driving a vehicle thereon. But it does not go to the standard of the duty imposed by our law upon a railroad company, or define the liability of such company under our Statute. Our Statute provides that a railroad company shall be liable for any damage done to stock or property of another by the running of locomotives or cars unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence—the presumption in all cases being against the company."

Because the effect of said charge was to deprive the defendant of the equal protection of the law, contrary to the Constitution of the United States and the bill of rights of the Constitution of Florida.

6. The Court erred in charging the jury as follows:

"If the plaintiff and the agents of the company, or if the servants of the plaintiff and the agents of the company, are both at fault, then the plaintiff may recover, but the damage shall be diminished or increased in proportion to the amount of fault attributed to him. Therefore, although the standard of care and duty required by the law of persons in crossing railroad tracks is such as I have stated and should be applied in this case, yet if you find from the evidence that the damage alleged was caused by the running of the defendant's railroad locomotive and train of cars on its tracks there may be a recovery for the damage done, unless the defendant company shall make it appear by a preponderance of the evidence that its employees exercised all ordinary and reasonable care and diligence in the premises."

Because the effect of said charge was to deprive the defendant of the equal protection of the law, contrary to the Constitution of the United States and the Bill of Rights of the Constitution of Florida.

[fol. 60] 7. The Court erred in charging the jury as follows:

"And if both the servant of the plaintiff and the employees of the railroad company were at fault in causing the damage alleged there may be a recovery, but the damage should be reduced in proportion to the contributory negligence of the plaintiff's servant."

Because the effect of said charge was to deprive the defendant of the equal protection of the law, contrary to the Constitution of the United States and the Bill of Rights of the Constitution of Florida.

8. The Court erred in charging the jury as follows:

"If you believe from the evidence in this case that in Gadsden County, Florida, in October 1926, the defendant's locomotive and train of cars ran upon and against the two mules and wagon of the plaintiff as alleged in the declaration, at a point where the Ashpalaga Road crosses the railroad track of the defendant company, and that at the time of such accident the defendant company's employees or agent did not use reasonable and proper care in the operation of said locomotive and train of cars and did not give warning of the approach of said locomotive and train of cars, then you should find for the plaintiff; unless the defendant company has made it appear by a preponderance of the evidence that its agents and employees used due care —all ordinary and reasonable care and diligence in the operation of said locomotive and train."

Because the effect of said charge was to deprive the defendant of the equal protection of the law, contrary to the Constitution of the United States and the Bill of Rights of the Constitution of Florida.

[fol. 61] 9. The Court erred in charging the jury as follows:

"If, however, you find from the evidence in this case that the damage alleged was caused jointly by the alleged negligence of the agents of the defendant company and contributed to by the alleged negligence and failure of the servant of the plaintiff, then you may still find for the plaintiff in

this case, but his damage should be diminished in proportion to the contributory act of his servant."

Because the effect of said charge was to deprive the defendant of the equal protection of the law, contrary to the Constitution of the United States and the Bill of Rights of the Constitution of Florida.

10. The Court erred in refusing the second charge requested by the defendant.

11. The Court erred in refusing the third charge requested by the defendant.

12. The Court erred in charging the jury as follows:

"If the damage sustained was contributed to by the servant of the plaintiff, and you should find that the defendant's agents were negligent as alleged, then you should diminish the amount of damage suffered in proportion as it was contributed to by the negligence of the plaintiff's servants in driving upon said tracks at said crossing."

Because the effect of said charge was to deprive the defendant of the equal protection of the law, contrary to the Constitution of the United States and the Bill of Rights of the State of Florida.

(Signed) Jas. L. Davidson, W. J. Oven, Attorneys for Defendant.

[fol. 62] The Court, upon consideration of said motion, on the 30th day of March, A. D. 1929, did then and there make the following order, to-wit:

ORDER DENYING MOTION FOR NEW TRIAL

"This cause coming on this day to be heard upon the motion of the defendant for a new trial in this cause, and the argument of counsel for the respective parties having been heard and considered by the Court, and the Court, being not fully advised of its decision to be rendered in the premises, it is—

Considered, ordered and ajudged by the Court that the motion of the defendant for a new trial in this cause be and the same is hereby denied, to which ruling of the Court

the defendant did then and there by its attorneys except. It is further

Considered, ordered and adjudged by the Court that the defendant be and it is hereby allowed sixty (60) days from this date within which to make up and present its bill of exceptions.

Done, Ordered and Adjudged, at Quincy, Florida, this the 30th day of March, A. D. 1929.

(Signed) E. C. Love, Judge."

The following is the Assignment of Errors presented to the Judge at the time of applying for the settlement of the Bill of Exceptions, viz:

[fol. 63] In Circuit Court of Gadsden County

[Title omitted]

Assignment of Errors

Now comes the defendant by its attorneys at the time of applying for the settlement of the Bill of Exceptions in the above stated cause and assigns the following errors upon which it intends to rely in the Appellate Court for a reversal of said cause:

1. That the verdict is contrary to the law.

2. The verdict is contrary to the evidence.

3. The verdict is contrary to the law and the evidence.

4. The verdict is grossly excessive under the evidence submitted.

5. The Court erred in charging the jury as follows:

"Now this is the duty imposed upon a person crossing a railroad track at a public crossing driving a vehicle thereon. But it does not go to the standard of the duty imposed by our law upon a railroad company, or define the liability of such company under our Statute. Our Statute provides that a railroad company shall be liable for any damage done to stock or property of another by the running of locomotives or cars unless the company shall make it ap-

pear that their agents have exercised all ordinary and reasonable care and diligence—the presumption in all cases being against the company."

Because the effect of said charge was to deprive the defendant of the equal protection of the law, contrary to the [fol. 64] Constitution of the United States and the Bill of Rights of the Constitution of Florida.

6. The Court erred in charging the jury as follows:

"If the plaintiff and the agents of the company, or if the servants of the plaintiff and the agents of the company, are both at fault, then the plaintiff may recover, but the damage shall be diminished or increased in proportion to the amount of fault attributed to him. Therefore, although the standard of care and duty required by the law of persons in crossing railroad tracks is such as I have stated and should be applied in this case, yet, if you find from the evidence that the damage alleged was caused by the running of the defendant's railroad locomotive and train of cars on its tracks, there may be a recovery for the damage done, unless the defendant company shall make it appear by a preponderance of the evidence that its employees exercised all ordinary and reasonable care and diligence in the premises."

Because the effect of said charge was to deprive the defendant of the equal protection of the law, contrary to the Constitution of the United States and the Bill of Rights of the Constitution of Florida.

7. The Court erred in charging the jury as follows:

"And if both the servant of the plaintiff and the employees of the railroad company were at fault in causing the damage alleged there may be a recovery, but the damage should be reduced in proportion to the contributory negligence of the plaintiff's servant."

Because the effect of said charge was to deprive the defendant of the equal protection of the law, contrary to the Constitution of the United States and the Bill of Rights of the Constitution of Florida.

8. The Court erred in charging the jury as follows:

"If you believe from the evidence in this case that in Gadsden County, Florida, in October 1926, the defendant's locomotive and train of cars ran upon and against the two mules and wagon of the plaintiff as alleged in the declaration, at a point where the Aspalaga road crosses the railroad track of the defendant company, and that at the time of such accident the defendant company's employees or agent did use reasonable and proper care in the operation of said locomotive and train of cars and did not give warning of the approach of said locomotive and train of cars, then you should find for the plaintiff; unless the defendant company has made it appear by a preponderance of the evidence that its agents and employees used due care—all ordinary and reasonable care and diligence in the operation of said locomotive and train."

Because the effect of said charge was to deprive the defendant of the equal protection of the law, contrary to the [fol. 65] Constitution of the United States and the Bill of Rights of the Constitution of Florida.

9. The Court erred in charging the jury as follows:

"If, however, you find from the evidence in this case that the damage alleged was caused jointly by the alleged negligence of the agents of the defendant company and contributed to by the alleged negligence and failure of the servant of the plaintiff, then you may still find for the plaintiff in this case, but his damage should be diminished in proportion to the contributory act of his servant."

Because the effect of said charge was to deprive the defendant of the equal protection of the law, contrary to the Constitution of the United States and the Bill of Rights of the Constitution of Florida.

10. The Court erred in refusing the second charge requested by the defendant.

11. The Court erred in refusing the third charge requested by the defendant.

12. The Court erred in charging the jury as follows:

"If the damage sustained was contributed to by the servant of the plaintiff, and you should find that the de-

fendant's agents were negligent as alleged, then you should diminish the amount of damage suffered in proportion as it was contributed to by the negligence of the plaintiff's servant in driving upon said tracks at said crossing."

Because the effect of said charge was to deprove the defendant of the equal protection of the law, contrary to the Constitution of the United States and the Bill of Rights of the Constitution of Florida.

13. The Court erred in overruling and denying defendant's motion for a new trial.

14. The Court erred in entering judgment in favor of the plaintiff and against the defendant.

W. J. Oven, Attorney for Defendant.

We hereby accept service of a copy of the foregoing [fol. 66] Assignment of Errors, together with a copy of the proposed Bill of Exceptions this day presented to the Judge trying said cause, this 28th day of May, A.D. 1929.

Watson & Taylor, Attorneys for the Plaintiff.

IN CIRCUIT COURT OF GADSDEN COUNTY

ORDER SETTLING BILL OF EXCEPTIONS

And inasmuch as the said several matters objected to or insisted upon, and considered by the Court do not appear by the record, the said defendant did, on the 28th day of May, A.D. 1929, after the expiration of said term, by virtue of a special order herein made, propose this his bill of exceptions to the said rulings of said Judge, and request him to sign the same, which, after due notice to the opposite party or his attorney, is done this 7th day of June, 1929.

I do hereby certify that the foregoing Bill of Exceptions contains all the evidence introduced at the trial in the above stated cause.

E. C. Love, Judge of the Circuit Court of the Second Judicial Circuit of Florida.

[fol. 67] IN CIRCUIT COURT OF GADSDEN COUNTY

PRÆCIPE FOR WRIT OF ERROR—Filed April 10, 1929

The Clerk of the Circuit Court will please issue a writ of error to the Circuit Court of Gadsden County, Florida, in the above styled cause, and make the same returnable to the 8th day of July, A. D. 1929.

This April 2nd, 1929.

W. J. Oven, Attorney for Defendant.

On the 10th day of April, A. D. 1929, writ of error issued, which was duly recorded in Current Circuit Court Minutes, at page 162, on the 10th day of April, A. D. 1929.

The record of said writ of error is in the words and figures following, to-wit:

Writ of error omitted by stipulation.

[fol. 68] IN CIRCUIT COURT OF GADSDEN COUNTY

RECITAL AS TO BOND, ETC.

On the 30th day of April, A. D. 1929, the Court made its order fixing the amount of supersedeas bond of the defendant in the sum of $750.00, and requiring the same to be filed within thirty days from said date.

On the 10th day of April, A. D. 1929, the defendant filed its supersedeas bond in the sum of Seven Hundred and fifty Dollars, and the same was duly approved by the Clerk of this Court on the said 10th day of April, A. D. 1929, said bond being in the sum of $750.00 as required by the aforesaid order.

On the 3rd day of June A. D. 1929, the defendant filed its complete assignment of errors with the Clerk at the time of filing instructions for making up the transcript of record, which said complete assignment of errors together with the acceptance of service of a copy thereof by coun-

[fol. 69] sel for defendant in *in* error, are in words and figures following, to-wit:

IN CIRCUIT COURT OF GADSDEN COUNTY

[Title omitted]

COMPLETE ASSIGNMENT OF ERRORS, FILED WITH THE CLERK AT THE TIME OF FILING INSTRUCTIONS FOR MAKING UP THE TRANSCRIPT OF RECORD

1. That the verdict is contrary to the law.

2. The verdict is contrary to the evidence.

3. The verdict is contrary to the law and the evidence.

4. The verdict is grossly excessive under the evidence submitted.

5. The Court erred in charging the jury as follows:

"Now this is the duty imposed upon a person crossing a railroad track at a public crossing driving a vehicle thereon. But it does not go to the standard of the duty imposed by our law upon a railroad company, or define the liability of such company under our Statute. Our Statute provides that a railroad company shall be liable for any damage done to *our* stock or property of another by the running of locomotives or cars unless the Company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence—the presumption in all cases being against the Company."

Because the effect of said charge was to deprive the defendant of the equal protection of the law, contrary to the Constitution of the United States and the Bill of Rights of [fol. 70] the Constitution of Florida.

6. The Court erred in charging the jury as follows:

"If the Plaintiff and the agents of the Company, or if the servants of the plaintiff and the agents of the Company, are both at fault, then the plaintiff may recover, but the damage shall be diminished or increased in proportion to the amount of fault attributed to him. Therefore, although the standard of care and duty required by the law

of persons in crossing railroad tracks is such as I have stated and should be applied in this case, yet, if you find from the evidence that the damage alleged was caused by the running of the defendant's railroad locomotive and train of cars on its train-, there may be a recovery for the damage done, unless the defendant company shall make it appear by a preponderance of the evidence that its employees exercised all ordinary and reasonable care and diligence in the premises."

Because the effect of said charge was to deprive the defendant of the equal protection of the law, contrary to the Constitution of the United States and the Bill of Rights of the Constitution of Florida.

7. The Court erred in charging the jury as follows:

"And if both the servant of the plaintiff and the employees of the Railroad Company were at fault in causing the damage alleged, there may be a recovery, but the damage should be reduced in proportion to the contributory negligence of the plaintiff's servant."

Because the effect of said charge was to deprive the defendant of the equal protection of the law, contrary to the Constitution of the United States and the Bill of Rights of the Constitution of Florida.

8. The Court erred in charging the jury as follows:

"If you believe from the evidence in this case that in Gadsden County, Florida, in October, 1926, the defendant's locomotive and train of cars ran upon and against the two mules and wagon of the plaintiff, as alleged in the declaration, at a point where the Aspalaga Road crosses the railroad track of the defendant company, and that at the time of such accident the defendant company's employees or agent did not use reasonable and proper care in the operation of said locomotive and train of cars, and did not give warning of the approach of said locomotive and train of cars, then you should find for the plaintiff; unless the defendant company has made it appear by a preponderance of the evidence that its agents and employees used due care—all ordinary and reasonable care and diligence in [fol. 71] the operation of said locomotive and train."

Because the effect of said charge was to deprive the defendant of the equal protection of the law, contrary to the Constitution of the United States and the Bill of Rights of the Constitution of Florida.

9. The Court erred in charging the jury as follows:

"If, however, you find from the evidence in this case, that the damage alleged was caused jointly by the alleged negligence of the agents of the defendant company and contributed to by the alleged negligence and failure of the servant of the plaintiff, then you may still find for the plaintiff in this case, but his damage should be diminished in proportion to the contributory act of his servant."

Because the effect of said charge was to deprive the defendant of the e-ual protection of the law, contrary to the Constitution of the United States and the Bill of Rights of the Constitution of Florida.

10. The Court erred in refusing the second charge requested by the defendant.

11. The Court erred in refusing the third charge requested by the defendant.

12. The Court erred in charging the jury as follows:

"If the damage sustained was contributed to by the servant of the plaintiff, and you should find that the defendant's agents were negligent as alleged, then you should diminish the amount of damage suffered in proportion as it was contributed to by the negligence of the plaintiff's servant in driving upon said tracks at said crossing."

Because the effect of said charge was to deprive the defendant of the equal protection of the law, contrary to the Constitution of the United States and the Bill of Rights of the Constitution of Florida.

13. The Court erred in overruling and denying defendant's motion for a new trial.

14. The Court erred in entering judgment in favor of the plaintiff and against the defendant.

W. J. Oven, Attorney for Defendant.

[fols. 72-74] Service of a copy of the foregoing complete assignment of errors filed at the time of filing instructions

for making up the transcript of the record is this day accepted and receipt of a copy thereof acknowledged this June 3rd, A. D. 1929.

Watson & Taylor, Plaintiff's Attorneys.

PRÆCIPE FOR TRANSCRIPT OF RECORD OMITTED BY STIPULATION

[fol. 75] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 76] And thereafter, to-wit, on the 12th day of November, A. D. 1931, counsel for the respective parties having filed in the Supreme Court of Florida their briefs in the said cause and having orally argued the said cause before the Supreme Court of Florida, the Supreme Court of Florida did render and file its Opinion in the said cause, which Opinion is in words and figures as follows, to-wit:

[fol. 77] IN SUPREME COURT OF FLORIDA, June Term, A. D. 1931

SEABOARD AIR LINE RAILWAY COMPANY, a Corporation, Plaintiff in Error,

vs.

A. W. WATSON, Defendant in Error

Writ of Error to Circuit Court, Gadsden County, E. C. Love, Judge

W. J. Oven for Plaintiff in Error.

J. Baxter Campbell and Watson & Taylor for Defendant in Error.

OPINION—Filed Nov. 12, 1931

MATHEWS, Commissioner:

A. W. Watson, hereinafter referred to as plaintiff, sued the Seaboard Air Line Railway Company, hereinafter referred to as defendant, in an action at law in the Circuit Court of Gadsden County, Florida, for damages sustained

by the killing of livestock and breacking of wagon by the running of a train.

The declaration alleges that the defendant did carelessly and negligently run and operate its engine and train of cars across the public crossing at a high, rapid and excessive rate of speed and failed to give warning and notice by the blowing of the whistle, or otherwise, of the approach of the train; that the engine ran against and killed plaintiff's mules and damaged plaintiff's wagon.

The defendant pleaded (1) not guilty; (2) that plaintiff's servant failed to stop, look and listen at the railroad crossing to determine whether or not the train was then and [fol. 78] there approaching, and that by reason of such failure the damage and injury sustained was caused solely by the negligence of plaintiff's servant: (3) that the plaintiff was barred from recovery because of the facts set forth in the second plea regardless of the failure of defendant to give warning and notice by the blowing of the whistle or otherwise. The fourth plea sets forth substantially the same defense as the second, except that instead of being a plea in bar, it alleges contributory negligence on the part of the plaintiff through and by his servant. The fifth plea alleges contributory negligence on the part of the plaintiff, in that the plaintiff's servant in driving of the team when approaching the track of the defendant failed to observe and use reasonable and ordinary care to determine whether or not a train of the defendant was approaching said crossing before he, the said servant, attempted to drive thereon.

Plaintiff joined issue on each of the defendant's five pleas. The case was tried on March 22nd, 1929, and a verdict was rendered by the jury in favor of the plaintiff in the amount of $564.00. Judgment was entered accordingly in favor of the plaintiff and against the defendant.

A motion for new trial was filed and in due course denied, and the cause comes here on writ of error.

The specific acts of negligence, as charged in the declaration, are running the train across the public road crossing at a high, rapid and excessive rate of speed, and failure to give warning and notice by the blowing of the whistle or otherwise of the approach of the train.

The first, second and third assignments of error question the sufficiency of the evidence to sustain the verdict and judgment.

The evidence, without contradiction, showed the train was on schedule time and the evidence was sufficient to [fol. 79] warrant the finding that the defendant's locomotive ran against plaintiff's mules and wagon, killing the mules and damaging the wagon.

"Under the issue of not guilty, the injury being shown to have been committed by the defendant in the running of its train, the presumption that it was through the negligence of the railroad that the injury was inflicted obtains against the defendant railroad, but such presumption does not outweight proofs, and it ceases when the company makes it to appear that its agents have exercised all ordinary and reasonable care and diligence. See Section 7051 (4964) Compiled General Laws of Florida 1927; Atlantic Coast Line R. Co. v. Crosby, 53 Fla., 400, 43 So. 318; Jones v. Jacksonville Electric Co., 56 Fla. 452, 47 So. 1; Seaboard Air Line R. Co. v. Thompson, 57 Fla. 155, 48 So. 750; Seaboard Air Line Ry. vs. Moseley, 60 Fla. 186, 53 So. 718; Florida East Coast R. Co. v. Welch, 53 Fla. 145, 44 So. 250, 12 Ann Cas. 210; Seaboard Air Line Ry. v. Smith, 53 Fla. 375, 43 So. 235; Johnson v. Louisville & N. R. Co., 59 Fla. 305, 52 So. 195." Seaboard Air Line Ry. Co. v. Myrick, 91 Fla. 918, 109 So. 193.

The question of negligence in the operation of a train at a crossing is one which must be resolved by consideration of many things, including condition of machinery and track in relation to speed, environment at point of accident, speed in relation to environment and signals of train's approach. Atlantic Coast Line R. Co. vs. Watkins, 97 Fla. 435, 121 So. 95.

The phrase "all ordinary and reasonable care" is susceptible of no hard and fast definition but varies with circumstances, and negligence in cases of this kind is failure to observe for the protection of another's interest such care, precaution and vigilance as the circumstances justly demand and the want of which causes injury. Atlantic Coast Line Railway vs. Watkins, supra.

[fol. 80] There was testimony by the defendant's witnesses in this case as follows:

By Hays, fireman on the locomotive: "He (the engineer) did not blow his whistle again after blowing for the crossing."

Thomas, conductor of the train: "I am positive the crossing signal was blown. My recollection is that the whistle was being sounded as the brakes were applied in emergency. The brakes were applied. They responded very promptly. I think we had seven cars and the rear car was still on the crossing when it stopped."

Johnson, porter on the train: "It went about a train length from the time the brakes were put on until it came to a dead stop."

Hays, fireman: "Air starts the automatic bell to ringing. It does not run all the time. You turn a valve on the bell. On the particular occasion the valve was turned about the time the whistle was being blown."

Lee, the engineer testified that he blew for the crossing at the signal post and later, just before the accident, sounded warning signals. He also testified that when he hit the wagon he was making between 30 and 35 miles per hour.

Witnesses for plaintiff testified, in rebuttal, as follows:

Woodberry: "The train did not blow at the post out there. I reckon it was fifty yards from the crossing when it did blow."

Charlie Hays: "The train blowed and said 'toot, toot, toot' and it hit something. The toot and the hit was about the same time—they were right together. That was the first time the train blowed."

It appears from the testimony of some of the witnesses that there was a curve in the railroad track before reaching [fol. 81] the crossing; that there is a siding known as Douglas siding, some little distance from the crossing, at which there is a warehouse, also a little cut in approaching the crossing which may have obstructed the view.

Warning to persons upon the highway of the approach of a train at a railroad crossing should be appropriate or reasonably adequate to effect the purpose which its exercise is designed to accomplish. Atlantic Coast Line Ry. v. Watkins, supra.

We are unable to say, in view of the evidence, that the defendant company used all ordinary and reasonable care and diligence necessary to relieve it of liability.

The rights and obligations of a railroad company and travelers on public highways are reciprocal of the cross-

ing of a railroad and public highway, but the railroad company's trains have the right-of-way, and persons on the highway should give precedence to the passing trains of the railroad at the crossings. It is therefore as much the duty of a person traveling upon the public highway who is about to cross a railroad track to use ordinary care and prudence to ascertain if a train is approaching upon the railroad track as it is the duty of the railroad company to warn by appropriate signal all persons who may be upon the public highway of the approach of a train about to cross the public highway. Seaboard Air Line Ry. v. Smith, supra; Seaboard Air Line Ry. v. Myrick, supra; Atlantic Coast Line Ry. v. Watkins, supra.

The standard of conduct on the part of a person approaching a railroad crossing to be applied in actions to recover for damages sustained by collision with a train at a railroad crossing is that when a person drives upon the railroad track, the driver of a vehicle must be sure whether a train is approaching, and if the driver of a vehicle cannot be sure otherwise whether a train is dangerously near, he must stop and get out of his vehicle. If he can otherwise assure himself whether or not a train is approaching [fol. 82] by stopping obviously he is not required to get out of the vehicle to observe whether or not a train is approaching a crossing. Atlantic Coast Line Ry. v. Watkins, supra.

Plaintiff's servant testified:

"It was in the day-time. I was going for a load of wood. I was going down in the piney wood. I turned to my right to cross the railroad. I didn't have a chance to get off the wagon after I saw the train. I didn't see it until it was right on me. I tried to get across if I could. The mules were walking before I got to the track. I looked for the train and didn't see it as I drove on. I couldn't see far down the track on account of a warehouse and high bank. I could see a pretty good piece. Was not a hundred yards. The mules didn't have to be exactly right on the track before I could look up it. I could see kinda-cat-a-cornered before I got on it."

Under the evidence, plaintiff's servant was himself guilty of negligence in driving the team of mules upon the crossing in front of the approaching train without exercising

care and prudence to ascertain if the train was approaching.

Under the fourth assignment of error, it is contended that the verdict is excessive. The testimony places a maximum value of the two mules killed at $300.00 and $250.00, respectively, and the cost of repairing the wagon at $14.00, and it is clear beyond conviction that the jury did not take into consideration the negligence of plaintiff's servant in arriving at the amount of the verdict.

Where injury at a railroad crossing is caused solely by the negligence of a party injured, there can be no recovery, but if the injury was caused by running of the train, and both injured party and the employes of the company were at fault, there may be recovery, but damages will be reduced in proportion to contributory negligence. Section [fol. 83] 7051 (4964) and Section 7052 (4965) Compiled General Laws of Florida 1927; Atlantic Coast Line Railway v. Watkins, supra; Germak v. Florida East Coast Railway, 95 Fla. 991, 117 So. 391; Louisville & Nashville R. Co. v. Harrison, 84 Fla. 497, 94 So. 382; Tampa Electric Co. v. Bryant, — Fla. —, 133, So. 887.

The remaining assignments of error relate to certain charges given and certain charges asked for by defendant, which were refused. These assignments question the constitutionality of Section 7051 (4964) Compiled General Laws of Florida 1927, as denying to the defendant due process of law and the equal protection of the law.

"In determining the legality and effect of a statutory regulation, the court as should ascertain the legislative intent; and if the ascertained intent will permit, the enactment should be construed and effectuated so as to make it conform to, rather than violate, applicable provisions and principles of the state and federal Constitutions, since it must be assumed that the Legislature intended the enactment to comport with the fundamental law. And a statute must be so construed, if fairly possible, as to avoid, not only the conclusion that it is unconstitutional, but also grave doubts upon that score." Railroad Commissioners v. Florida East Coast Ry. Co., 77 Fla. 259, 81 So. 464.

The leading authority relied upon by defendant is Western & Atlantic Railroad Co. v. Henderson, 279 U. S. 639, 73 Law Ed. 884, 49 Supreme Court Rep. 445. In that case,

the Supreme Court of the United States had under consideration a statute similar to Section 7051 (4964) Compiled General Laws of Florida 1927, and it was there stated by the court that the jury in the court below was permitted to consider and weigh the presumption of the statute as evidence as against opposing testimony, and the Supreme Court of the United States in that decision held that the statute of Georgia, as *construed by the Supreme Court of Georgia in that case* (italics ours) creates an inference that is given the effect of evidence to be weighed against [fol. 84] opposing testimony and is to prevail unless such testimony is found by the jury to preponderate.

All that the statute does in this state in creating a presumption is thereby to cast upon the railroad company the burden of affirmatively showing that its agents exercised all ordinary and reasonable care and diligence, and here the statutory presumption ends. Seaboard Air Line Ry. vs. Thompson, supra.

The application of a statute in a particular case may violate organic laws, but the statute as framed may not be unconstitutional when properly applied. Dutton Phosphate Company v. Priest, 67 Fla. 370, 65 So. 282.

The court below properly instructed the jury with regard to the presumption in this case.

In the case of J. & K. C. R. Co. v. Turnipseed, 219 U. S. 35, 55 Law. Ed. 78, 32 L. R. A. (N. S.) 226, 31 Sup. Ct. Rep. 136, Ann Cas. 1912-A, 463, 2 N C. C. A. 243, a statute quite similar in its operation to the Florida statute was therein held constitutional, and this case was commented upon with approval in Western & A. R. Co. v. Henderson, supra.

In the Turnipseed case, it was held that the only legal effect of the inference was to cast upon the railroad company the duty of producing some evidence to the contrary. When that was done, the inference was at an end and the question of negligence was one for the jury upon all the evidence. It was there said that the statute did not fail in due process of law because it created a presumption of liability, since its operation was only to supply an inference of liability in the absence of other evidence contradicting such inference.

It was next contended that the statute is unconstitutional in not applying to buses in the same manner as to railroads.

But a statute does not offend any provision of organic law merely because it may not in legal effect cover the entire [fols. 85 & 86] field that is subject to similar legislation. Dutton Phosphate Co. vs. Priest, supra.

We have carefully examined the entire charge of the court below to the jury, also the instruction asked for by defendant which was refused. The charges given, in the main, accord with the law of this case, as above indicated, and it does not appear that the court erred in refusing the instruction asked for, which was denied.

A ground of liability appearing, and the damages awarded not being properly apportioned, it is ordered that if within thirty days the plaintiff below enters a remittitur of $300.00 as of the date of the judgment, the judgment shall stand affirmed for $264.00, otherwise the judgment will stand reversed for a new trial. See St. Johns Electric Co. v. Lawler, 90 Fla. 188, 105, So. 818; S. U. Co. v. Davis, 90 Fla. 108, 105 So. 315; Tampa Electric Co. v. Bryant, supra; Louisville & Nashville R. Co. v. Henderson, supra.

Per Curiam:

The record in this cause having been considered by the court, and the foregoing opinion prepared under Chapter 14553, Acts of 1929 (Extra Sess.) adopted by the court as its opinion, it is considered, ordered and adjudged by the Court that if within thirty days the plaintiff enters a remittitur of $300.00 as of the date of the judgment the judgment shall stand affirmed for $264.00, otherwise the judgment will stand reversed for a new trial.

Buford, C. J., and Whitfield, Ellis, Brown and Davis, JJ., concur.

Terrell, J., dissenting:

I think the judgment below should be reversed.

[fols. 87 & 88] IN SUPREME COURT OF FLORIDA, JUNE TERM, A. D. 1931

S. A. L. RAILWAY COMPANY, Plaintiff in Error,

vs.

A. W. WATSON, Defendant in Error.

A Writ of Error to the Circuit Court for Gadsden County

JUDGMENT—November 12, 1931.

This cause having heretofore been submitted to the Court upon transcript of the record of the judgment herein, and briefs and argument of counsel for the respective parties, and the record having been seen and inspected, and the Court being now advised of its judgment to be given in the premises; it is, therefore, considered, ordered and adjudged by the Court that if within thirty days the plaintiff enters a remittitur of $300.00 as of the date of the judgment, the judgment shall stand affirmed for $264.00, otherwise the judgment will stand reversed for a new trial.

[fol. 89] IN SUPREME COURT OF FLORIDA

[Title omitted]

PETITION FOR REHEARING—Filed Dec. 11, 1931

Now comes the Plaintiff in Error in the above stated cause by its Attorney and respectfully prays the Court to grant it a rehearing in this cause, decided by this Court through one of its Honorable Commissioners on the 13th day of November, A. D. 1931, and to sustain the said petition Plaintiff in Error respectfully submits to the consideration of the Court therefor the following grounds:

1. That in arriving at the decision rendered herein the Court through its said Commissioner has, by the opinion, evidently imposed upon the plaintiff in error the additional burden of meeting questions not tendered by Plaintiff's declaration in this: That the Court through its Commis-

sioner finds that the allegations of the declaration were based upon negligence in running and operating the engine and train across a public crossing at a high, rapid and excessive rate of speed and failing to give warning and notice by the blowing of the whistle or otherwise of the approach of the train, while the Court through its Commissioner seems to have held the plaintiff in error to the necessity of showing the condition of the machinery, the condition of the track and the speed in relation to the en-
[fol. 90] vironment, whereas such issues were not raised by the pleadings before the Court.

2. That in arriving at a decision the Court, through its Commissioner, in detailing the testimony on which its opinion seems to have been based, has

(a) Overlooked or disregarded the testimony of all of the disinterested eye witnesses as to signals and the manner in which the accident occurred; and

(b) Overlooked the point in the testimony of plaintiff's servant (the only eye witness for plaintiff) that if "he did not have a chance to get off the wagon after I saw the train" and did not see it until it was right on him, that his negligence in failing to look was the proximate cause of the accident, and, on the contrary, if he did look and tried to get across that such effort to cross when he should not have attempted it was the proximate cause of the accident; that if he could see a hundred yards off at the rate of speed the train is shown to have been going he could by use of ordinary care have stopped his mules or turned them.

In short, that a close analysis of the evidence, taking it either way, shows that the accident was caused solely by the negligence of the driver, and that it could have occurred and did occur regardless of when or how the signals were given, and the doctrine as laid down by this Court in the Myrick case and other cases cited by the Commissioner and in the brief of plaintiff in error barring recovery apply and should have been applied in this case.

3. That the Court through its Commissioner has overlooked or failed to consider the effect of the charges of the Court with reference to the presumption of negligence imposed upon plaintiff in error by the Statute as con-

[fol. 91] strued in the opinion in connection with Western & Atlantic v. Henderson cited by the Commissioner and cited in the brief of Plaintiff in Error in this: That if under the ruling of this Court in this case (and of this Court in the Thompson case and Crosby case cited by the Commissioner and cited by the Plaintiff in Error in its brief) this case falls within that class of cases condemned in the Henderson case and is not within that class sustained in the Turnipseed case, then the Statute casting the presumption of negligence on the railroad is unconstitutional. And, on the other hand, if this case falls in that class sustained in the Turnipseed case then the charges of the Court letting the jury take the presumption of negligence against the railroad into the jury room was error, because, manifestly, Plaintiff in Error had clearly shown by its train crew that there was no negligence in the operation of the train; that the signals had been given and therefore there could be no presumption against the Plaintiff in Error which the jury could take into their room as was held by the late Mr. Chief Justice Taylor in the Thompson case.

4. That the Court through its Commissioner has failed, in construing the facts in this case in connection with those cases decided by the United States Supreme Court, to-wit, the Henderson case and the Turnipseed case cited in the opinion of the Commissioner and cited in the briefs of counsel, to observe the fact that this Court has always followed the construction of the Georgia Statute held unconstitutional in the Henderson case and that the Supreme Court of Georgia has since the Henderson case conceded the holding therein and followed it, which, in effect, would seem to require the observance of it by this Honorable Court, unless it is to reverse its former opinion on the subject. That the instant case was tried exactly as was the Henderson case and that the charges of the Court on [fol. 92] the question of presumption were in effect the same as in the Henderson case and entirely different from the Turnipseed case distinguished by the Supreme Court of the United States in the Henderson case aforesaid.

5. The Court through its Commissioner has said:

"In the Turnipseed case, it was held that the only legal effect of the inference was to cast upon the railroad com-

pany the duty of producing some evidence to the contrary. When that was done, the inference was at an end and the question of negligence was one for the jury upon all the evidence. It was there said that the statute did not fail in due process of the law because it created a presumption of liability, since its operation was only to supply an inference of liability in the absence of other evidence contradicting such inference."

And if this be the construction of the Florida Statute to be adopted and enforced by this Court in this and subsequent cases, then this Court, we submit, must have overlooked the burden placed upon the Plaintiff in Error by the charges of the Court to the jury made the basis of the fifth, sixth, seventh, eighth and ninth assignments of error, because the fact cannot be escaped that in the instant case the jury took the presumption of negligence against the defendant with them to the jury room, though it should have been, under this Court's explanation of the Turnipseed case made herein, left to their discretion without a charge from the Court placing the burden on the Plaintiff in Error to decide the issues of fact as between the parties.

6. It is respectfully submitted that the Court through its Commissioner, in determining that the Statute is not unconstitutional because of discrimination as against railroads and in favor of carriers for hire by motor vehicles, has overlooked and failed to consider, first, a clear distinction made by this Court in cases of this kind in Seaboard Air Line v. Simon (cited in the brief of Plaintiff in Error) and the cases therein cited, in connection with the fact that motor busses and motor trucks are carriers [fol. 93] for hire as much so as steam railroads (though they have become so since the Statute attacked was passed); and, second, in connection therewith, the holding of this Court that the operation of a motor vehicle is in effect the use of a dangerous instrumentality on the highway, and that soonoer or later, and beyond escape, the Court must reach the point that in a case against joint tort feasors the question involved here will necessitate the discrimination in charges as against the one defendant and the other.

It is further respectfully submitted to the Court that because of the grave and far reaching constitutional question involved in this case, to-wit, the constitutionality of the Statute, in view of the Henderson case, and the constitutionality of the Statute because of the challenged question of discrimination as between railroads and motor carriers for hire, the Court should in justice to the Plaintiff in Error follow the rule heretofore followed in hearing constitutional questions by the entire Court.

It is further respectfully submitted to the Court that disregarding all other questions, the verdict being so excessive and this Court having so found it to be, and it being apparent that Plaintiff in Error was compelled by the denial of the plaintiff in error's motion for a new trial to seek redress in this Court, that the costs incident to the suing out of the writ of error and obtaining a hearing before this Court thereon should be, or at least a proportionate part thereof, taxed against the defendant in error, or otherwise, the plaintiff in error is in effect to the extent penalized for seeking redress in this Court to which this Court has found it entitled.

It is respectfully prayed that Plaintiff in Error may be permitted to file brief in support of this petition.

Respectfully submitted.

W. J. Oven, Attorney for Plaintiff in Error.

[fols. 94 & 95] In Supreme Court of Florida

Recital of Order Denying Rehearing

And thereafter, to-wit, on the 5th day of January, A. D. 1932, the Supreme Court of Florida did enter an order without Opinion denying the aforesaid petition for rehearing.

[fol. 96] In Supreme Court of Florida

[Title omitted]

Petition for Appeal from the Supreme Court of the State of Florida to the Supreme Court of the United States —Filed Jan. 22, 1932.

To the Chief Justice of the Supreme Court of the State of Florida:

Seaboard Air Line Railway Company, a Corporation, your Petitioner, respectfully shows:

1. Petitioner is the Plaintiff in Error in the above entitled cause.

2. The above-named Defendant in Error instituted its suit in the Circuit Court of Gadsden County, Florida, on the 26th day of January, A. D. 1928, and filed his declaration therein on the 9th day of February, 1928, which said declaration or complaint was for the alleged negligent killing of two mules of Defendant in Error and damage to his wagon caused by a collision with a train of petitioner being operated on its tracks in Gadsden County, Florida, on the 26th day of October, A. D. 1926; it being alleged and claimed that the Defendant in Error sustained the said damage because of the negligent operation by Plaintiff in Error of [fol. 97] its engine, train and cars at a point where a public road in said County of Gadsden crossed the railroad track of the Plaintiff in Error, and judgment was rendered therefor on the 22nd day of March, A. D. 1929, in favor of the Defendant in Error and against Plaintiff in Error in the sum of Five Hundred Sixty-Four ($564.00) Dollars.

3. On writ of error from said judgment to the Supreme Court of the State of Florida, the said judgment was by the said Supreme Court of the State of Florida affirmed on the 12th day of November, A. D. 1931, upon condition that Defendant in Error enter a remittitur of Three Hundred ($300.00) Dollars as of the date of the judgment, and that then the judgment should stand affirmed for Two Hundred Sixty-Four ($264.00) Dollars. (See Seaboard Air Line Ry. Co. v. Watson, 137 So. Rep. 719. Advance Sheet No. 6, December 24th, 1931.)

That said remittitur was duly entered by Defendant in Error. That thereafter, on, to-wit, the 11th day of December A. D. 1931, your Petitioner, within thirty days from the rendition of said judgment, in conformity with and pursuant to Rule 25 of the Rules of the Supreme Court of the State of Florida, applied by petition for a rehearing, which petition was denied by the said Supreme Court of Florida on the 5th day of January, A. D. 1932, no opinion on the petition being filed.

4. In said cause there is drawn in question the validity of the Statute of the State of Florida, to-wit, Section 7051 Compiled General Laws of Florida, 1927 (Section 4964 Re-

vised General Statutes 1920) on the ground of it being repugnant to the Constitution of the United States, and that the effect of the several charges of the trial Court to the jury in charging the law in the case under said Statute was to deprive the plaintiff in error of the equal protection of [fols. 98 & 99] the law, contrary to the Constitution of the United States; and the decision of the Supreme Court of the State of Florida and its action in denying the petition for a rehearing was and is in favor of the validity of the said Statute and sustained the construction placed upon said Statute by the trial court in his charges to the jury on the law of the case. That in this the plaintiff in error contended and respectfully submits and contends that the said State Statute is in violation of the Federal Constitution and that the interpretation placed upon said State Statute by the trial court and affirmed by the Supreme Court of the State of Florida had the effect of, did and does deprive the petitioner of the equal protection of the law, contrary to Section I of Article XIV of the Constitution of the United States.

Wherefore petitioner prays for the allowance of an appeal from said Supreme Court of the State of Florida (the highest Court in said State) to the Supreme Court of the United States, in order that the decision of the Supreme Court of the State of Florida may be examined and reversed; and also prays that a transcript of the record, proceedings and papers in this cause, duly authenticated by the Clerk of the Supreme Court of the State of Florida, may be sent to the Supreme Court of the United States, as provided by law.

Petitioner desiring the appeal to be a supersedeas prays an order touching the security to be required of it, and the approval of such bond as required in said cause.

The errors upon which your petitioner claims to be entitled to an appeal are those indicated, and more fully set out in the assignment of errors filed herewith.

Dated January 22, A. D. 1932.

W. J. Oven, Attorney for Petitioner and Proposed Appellant.

[fol. 100] IN SUPREME COURT OF FLORIDA

[Title omitted]

ASSIGNMENT OF ERRORS PRESENTED TO THE CHIEF JUSTICE OF THE SUPREME COURT OF FLORIDA AT THE TIME OF APPLYING BY PETITION FOR APPEAL—Filed Jan. 22, 1932.

The said Seaboard Air Line Railway Company, a Corporation, assigns the following errors in the record and proceedings in the said case:

1. The Supreme Court of the State of Florida erred in holding Section 7051 Compiled General Laws of Florida, 1927, (Section 4964 Revised General Statutes of Florida, 1920,) to be valid and not repugnant to Section I of Article XIV of the Constitution of the United States.

2. The Supreme Court of the State of Florida erred in holding that the scope and effect of Section 7051 Compiled General Laws of Florida, 1927, (Section 4964 Revised General Statutes of Florida, 1920,) did not in the trial of this case in the Court below deprive the said Seaboard Ail Line Railway Company, a corporation, of its property without due process of law and of the equal protection of the law as guaranteed to it by Section I of Article XIV of the Constitution of the United States.

[fol. 101] 3. The Supreme Court of the State of Florida erred in holding that Section 7051 Compiled General Laws of Florida, 1927 (Section 4964 Revised General Statutes of Florida, 1920), which provides:

"7051. (4964). Liability of Railroad Company.—A railroad company shall be liable for any damage done to persons, stock or other property, by the running of the locomotives, or cars, or other machinery of such company, or for damage done by any person in the employ and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company;"

did not in effect deny to the said Seaboard Air Line Railway Company, a corporation, the equal protection of the law guaranteed to it by the Constitution of the United

States, because the presumption cast by the Statute upon a railroad company was and is not likewise cast upon auto transportation companies handling passengers and goods for hire over the public roads of the State of Florida.

4. In said suit there was drawn in question the validity of the Statute of the State of Florida, to-wit, Section 7051 Compiled General Laws of Florida, 1927, (Section 4964 Revised General Statutes of Florida, 1920,) on the ground that it was repugnant to Section 1 of Article XIV of the Constitution of the United States, and the decision of the Supreme Court of the State of Florida was in favor of the validity of said Statute, which decision is hereby assigned as error.

5. In said suit the Supreme Court of the State of Florida, in holding that the Fifth Assignment of Error before it, being, to-wit:

"5. The Court erred in charging the jury as follows: 'Now this is the duty imposed upon a person crossing a railroad track at a public crossing driving a vehicle thereon. But it does not go to the standard of the duty imposed by [fol. 102] our law upon a railroad company, or define the liability of such company under our Statute. Our Statute provides that a railroad company shall be liable for any damage done to stock or property of another by the running of locomotives or cars unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the Company.' Because the effect of said charge was to deprive the defendant of the equal protection of the law, contrary to the Constitution of the United States and the Bill of Rights of the Constitution of Florida,"

was not well taken, did, in effect, by so holding, in connection with its construction of the State Statute as shown in its opinion in this case, deprive said Seaboard Air Line Railway Company, a Corporation, of the equal protection of the law guaranteed to it by Section I of Article XIV of the Constitution of the United States.

6. In said suit the Supreme Court of the State of Florida, in holding that the Sixth Assignment of Error before it, being, to-wit:

"6. The Court erred in charging the jury as follows: 'If the plaintiff and the agents of the company, or if the servants of the plaintiff and the agents of the company are both at fault, then the plaintiff may recover, but the damage shall be diminished or increased in proportion to the amount of fault attributed to him. Therefore, although the standard of care and duty required by the law of persons in crossing railroad tracks is such as I have stated and should be applied in this case, yet, if you find from the evidence that the damage alleged was caused by the running of the defendant's railroad locomotive and train of cars on its tracks, there may be a recovery for the damage done, unless the defendant company shall make it appear by a preponderance of the evidence that its employees exercised all ordinary and reasonable care and diligence in the premises;' Because the effect of said charge was to deprive the defendant of the equal protection of the law contraty to the Constitution of the United States and the Bill of Rights of the Constitution of Florida,"

was not well taken, did, in effect, by so holding, in connection with its construction of the State Statute as shown in [fol. 103] its opinion in this case, deprive said Seaboard Air Line Railway Company, a Corporation, of the equal protection of the law guaranteed to it by Section I of Article XIV of the Constitution of the United States.

7. In said suit the Supreme Court of the State of Florida, in holding that the Seventh Assignment of Error before it, being, to-wit:

"7. The Court erred in charging the jury as follows: 'And if both the servant of the plaintiff and the employees of the railroad company were at fault in causing the damage alleged there may be a recovery, but the damage should be reduced in proportion to the contributory negligence of the plaintiff's servant;' because the effect of said charge was to deprive the defendant of the equal protection of the law, contrary to the Constitution of the United States and the Bill of Rights of the Constitution of Florida,"

was not well taken, did, in effect, by so holding, in connection with its construction of the State Statute as shown in its opinion in this case, deprive said Seaboard Air Line Rail-

way Company, a corporation, of the equal protection of the law guaranteed to it by Section I of Article XIV of the Constitution of the United States.

8. In said suit the Supreme Court of the State of Florida, in holding that the Eighth Assignment of Error before it, being to-wit:

"8. The Court erred in charging the jury as follows: 'If you believe from the evidence in this case that in Gadsden County, Florida, in October 1926, the defendant's locomotive and train of cars ran upon and against the two mules and wagon of the plaintiff as alleged in the declaration, at a point where the Aspalaga road crosses the railroad track of the defendant company, and that at the time of such accident the defendant company's employees or agent did not use reasonable and proper care in the operation of said locomotive and train of cars and did not give warning of the approach of said locomotive and train of cars, then you should find for the plaintiff; unless the defendant company [fol. 104] has made it appear by a preponderance of the evidence that its agents and employees used due care—all ordinary and reasonable care and diligence in the operation of said locomotive and train;' because the effect of said charge was to deprive the defendant of the equal protection of the law, contrary to the Constitution of the United States and the Bill of Rights of the Constitution of Florida,"

was not well taken, did, in effect, by so holding, in connection with its construction of the State Statute as shown in its opinion in this case, deprive said Seaboard Ail Line Railway Company, a corporation, of the equal protection of the law guaranteed to it by Section I of Article XIV of the Constitution of the United States.

9. In said suit the Supreme Court of the State of Florida, in holding that the Ninth Assignment of Error before it, being, to-wit:

"9. The Court erred in charging the jury as follows: 'If, however, you find from the evidence in this case that the damage alleged was caused jointly by the alleged negligence of the agents of the defendant company and contributed to by the alleged negligence and failure of the servant of the plaintiff, then you may still find for the plaintiff in this case,

but his damage should be diminished in proportion to the contributory act of his servant;' because the effect of said charge was to deprive the defendant of the equal protection of the law, contrary to the Constitution of the United States and the Bill of Rights of the Constitution of Florida;"

was not well taken, did, in effect, by so holding, in connection with its construction of the State Statute as shown in its opinion in this case, deprive said Seaboard Air Line Railway Company, a corporation, of the equal protection of the law guaranteed to it by Section I of Article XIV of the Constitution of the United States.

10. The Supreme Court of Florida erred in refusing to consider the Tenth Assignment of Error of the Seaboard [fol. 105] Air Line Railway Company, a corporation, which said assignment was based upon the refusal of the trial Court to give the following charge:

"I charge you as a matter of law that the standard of care required of person in crossing a railroad track to be applied in actions to recover damages for injuries sustained by collision with a train at a railroad crossing is that when a person drives upon a railroad track, he knows that he goes to a place where he will be killed or sustain damage if a train comes upon him before clearing the track. He knows he must stop for the train, not the train stop for him. On such circumstances, if the driver of a vehicle cannot be sure otherwise whether a train is dangerously near, he must stop and get out of his vehicle (although obviously, he will not often be required to do more than to stop and to look), and if you find from the evidence that the driver of plaintiff's vehicle could, by the application of such standard of care, have avoided the injury, but that he failed to stop and look for the approach of the train, then I charge you that the plaintiff, because of such negligence of the driver of the vehicle and team, is barred of recovery and your verdict should be for the defendant."

And by its action in sustaining the refusal of the trial Court to give said charge, in view of the construction placed upon the Statute by the Supreme Court of Florida, it denied to said Seaboard Air Line Railway Company, a corporation, the equal protection of the law guaranteed to it by Section I of Article XIV of the Constitution of the United States.

11. The Supreme Court of Florida erred in refusing to consider the Eleventh Assignment of Error of the Seaboard Air Line Railway Company, a corporation, which said assignment was based upon the refusal of the trial Court to give the following charge:

"I charge you as a matter of law that the standard of care required of a person in crossing a railroad track to be applied in actions to recover damages for injuries sustained by collision with a train at a railroad crossing, is that when [fol. 106] a person drives upon a railroad track he knows that he goes to a place where he will be killed or sustain damage if a train comes upon him before clearing the track; he knows he must stop for the train, not the train stop for him. In such circumstances, if a driver of a vehicle cannot be sure otherwise whether a train is dangerously near, he must stop and get out of his vehicle, although, obviously, he will not often be required to do more than to stop and to look; and if you find from the evidence that the driver of the plaintiff could, by the application of such standard of care, have avoided the injury but that he failed to stop and look for the approach of the train, then I charge you that if you find from the evidence in this case that the employees of the defendant used all ordinary and reasonable care under the circumstances in the operation of the defendant's train, then the plaintiff is chargeable with the negligence of his servant, the driver, and the plaintiff would be barred from recovery and your verdict should be for the defendant."

And by its action in sustaining the refusal of the trial Court to give said charge, in view of the construction placed upon the Statute by the Supreme Court of Florida, it denied to said Seaboard Air Line Railway Company, a corporation, the equal protection of the law guaranteed to it by Section I of Article XIV of the Constitution of the United States.

12. The Supreme Court of the State of Florida having by its opinion rendered in this cause on the 12th day of November, A. D. 1931, held in effect that Section 7051 Compiled General Laws of Florida, 1927 (Section 4964 Revised General Statutes of Florida, 1920) was similar in its operation to the Mississippi Statute construed by the Supreme Court of the United States in the case of Mobile, Jackson

& Kansas City R. R. Co. vs. J. A. Turnipseed, 219 U. S. 35; 31 Sup. Ct. Rep. 136; 55 Law Ed. 78, did err by its holding (in the light of such construction) that the trial Court committed no reversible error in giving the instructions complained of in the Supreme Court of Florida under Assignments of Error numbered 5, 6, 7, 8 and 9 severally and col- [fols. 107 & 108] lectively, and in this did deprive the said Seaboard Air Line Railway Company, a corporation, of the equal protection of the law guaranteed to it by Section I of Article XIV of the Constitution of the United States.

For which errors it prays that the said judgment of the Supreme Court of the State of Florida, dated November 12, 1931, in the above styled cause, be reversed and a judgment rendered in favor of the said Seaboard Air Line Railway Company, a corporation.

Dated January 22, A. D. 1932.

W. J. Oven, Counsel for Appellant.

[fol. 109] IN SUPREME COURT OF FLORIDA

SEABOARD AIR LINE RAILWAY COMPANY, A Corporation, Plaintiff in Error,

vs.

A. W. WATSON, Defendant in Error

ORDER ALLOWING APPEAL—Filed Jan. 22, 1932

The petition of the Seaboard Air Line Railway Company, a Corporation, for an appeal in the above cause to the Supreme Court of the United States from the Supreme Court of the State of Florida, and the Assignments of Error filed therewith and the record of said cause having been considered, it is

Ordered that an appeal be and is allowed to the Supreme Court of the United States from the Supreme Court of the State of Florida as prayed in said petition, and that the Clerk of the Supreme Court of the State of Florida shall prepare and certify a transcript of the record and proceedings in the above cause and transmit the same to the Supreme Court of the United States within thirty days from the date hereof.

It is further ordered that said Seaboard Air Line Railway Company, a corporation, shall give good and sufficient security in the sum of Five hundred Dollars, that said Appellant shall prosecute said appeal to effect, and if said Appellant fail to make its plea good, it shall answer all damages and costs. Said bond to be approved by the Clerk of this Court and to be filed herein within ten days from this date.

Upon the filing and approval of said bond it is ordered that the said appeal shall operate as a supersedeas.

[fol. 110] Dated this 22nd day of January, A. D. 1932.

Rivers Buford, Chief Justice of the Supreme Court of Florida.

[fols. 111-116] Supersedeas bond on appeal for $500.00, approved and filed January 28, 1932, omitted in printing.

[fols. 117-120] Citation, in usual form, showing service on H. M. Taylor, filed January 22, 1932, omitted in printing.

[fol. 121] IN SUPREME COURT OF FLORIDA

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed Jan. 23, 1932

To the Clerk of the above Court:

You are hereby requested to make a transcript of the record to be filed in the Supreme Court of the United States pursuant to an appeal allowed in the above entitled cause and to include in such transcript of record the following, and no other, papers and exhibits, to-wit:

1. The Transcript of Record of Proceedings in the Circuit Court of the Second Judicial Circuit of Florida in and for Gadsden County, wherein the appellee in this case was plaintiff and the appellant in this case was defendant, therein lately pending, which was filed in the Supreme Court of Florida on the 8th day of July A. D. 1929, pursuant to the writ of error issued from the Supreme Court of Florida to

said Circuit Court in said cause on the 10th day of April, A. D. 1929.

2. Copy in full the opinion of the Supreme Court of Florida affirming the judgment of the Circuit Court of the Second Judicial Circuit of Florida, in and for Gadsden County, filed by the said Supreme Court November 12, A. D. 1931.

3. Recite the substance of Rule 25 of the Supreme Court of Florida which allows thirty days from the rendition of [fol. 122] any judgment by it in which either party to a cause may file a petition for a rehearing.

4. Copy in full the petition of Seaboard Air Line Railway Company, a Corporation, for a rehearing filed with the Supreme Court of Florida December 11, A. D. 1931.

5. Recite that on January 5th, A. D. 1932, the Supreme Court of Florida denied without opinion the aforesaid petition for a rehearing.

6. Copy in full the judgment of the Supreme Court of Florida rendered consequent upon its affirmation of the judgment of the Circuit Court of the Second Judicial Circuit of Florida, in and for Gadsden County.

7. Copy in full the petition of the Seaboard Air Line Railway Company, a corporation, to the Chief Justice of the Supreme Court of Florida for the allowance of an appeal, and recite thereafter that the said Supreme Court of Florida is the State Court of last resort in the State of Florida.

8. Copy in full the assignments of error presented to the Chief Justice of the Supreme Court of Florida and filed with and at the time of the presentation of the petition for appeal herein to the Supreme Court of the United States.

9. Copy in full the Order of the Chief Justice of the Supreme Court of the State of Florida allowing the appeal herein.

10. Recite the filing and approval of the bond required in and by said Order allowing said appeal to the Supreme Court of the United States.

11. Copy in full the citation issued by the Chief Justice of the Supreme Court of Florida, directed in the name of the United States of America to A. W. Watson, the plaintiff in the trial Court and the defendant in error in the [fol. 123] Supreme Court of the State of Florida and the Appellee named in said citation.

12. Copy in full following the above citation the proof of acknowledgment of service of the said citation.

13. Copy in full this præcipe, together with proof of acknowledgment of service of a copy thereof on the defendant in error here, appellee in the Supreme Court of the United States.

Said transcript to be prepared as required by law and the rules of this Court and the rules of the Supreme Court of the United States, and to be filed in the office of the Clerk of the Supreme Court of the United States atWashington, D. C., on or before the 22nd day of February, A. D. 1932.

Dated January 22nd, A. D. 1932.

W. J. Oven, Attorney for Appellant.

Service of the above præcipe accepted and acknowledged this the 23rd day of January, A. D. 1932.

H. M. Taylor, Attorney for Appellee.

[fol. 124] Clerk's certificate to foregoing transcript omitted in printing.

[fols. 125 & 125½] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION AS TO PRINTING RECORD—Filed Feb. 16, 1932

Comes now Seaboard Air Line Railway Company, the Appellant in the above entitled cause and adopts its assignments of error as its statement of the points to be relied upon, and states that the whole of the record as filed is necessary for the consideration of the case, except such parts thereof as may by stipulation of counsel be requested to be omitted.

Dated February 12, 1932.

W. J. Oven, W. J. Oven, Counsel for Appellant.

[fol. 126] STIPULATION

It is hereby stipulated between the Appellant, by its Attorney, and the Appellee, by his Attorney, that in print-

ing the Record in the above entitled cause the Clerk shall omit therefrom the following documents and papers, to-wit:

(1) All testimony relating to value as distinguished from negligence, appearing in the typewritten transcript the testimony of A. W. Watson, (Record pages 15-18, 23-24); testimony of Jack McFarlin, (Record pages 19-20); testimony of R. E. Blitch (Record pages 21-22);

(2) The record of the writ of error from the Supreme Court of the State of Florida to the Circuit Court of the Second Judicial Circuit of Florida, beginning near the top of page 67 of Record and concluding with the signature of the Clerk of the Circuit Court of Gadsden County, Florida to the certificate of record of said writ on page 68 of Record;

(3) The record of the directions to the Clerk of the Circuit Court for making up transcript of record of proceedings in said Circuit Court, beginning with the second paragraph on page 72 of Record and concluding with acceptance of service of counsel on page 75 of the Record;

(4) The record of the Supersedeas Bond filed by Appellant and approved by the Clerk of the Supreme Court of [fols. 127 & 127a] Florida on January 23, 1932 (Record pages 111-112-113-114-115),

Reciting that such have been omitted by stipulation.

Dated this February 12th, A. D. 1932.

W. J. Oven, W. J. Oven, Attorney for Appellant.
H. M. Taylor, H. M. Taylor, Attorney for Appellee.

[fol. 127b] [File endorsement omitted.]

[fols. 128 & 128½] IN SUPREME COURT OF THE UNITED STATES

NOTICE—Filed Feb. 19, 1932

To Honorable Hugh M. Taylor, attorney and counsel of record for the appellee, A. W. Watson, Quincy, Florida:

You are hereby notified that a Statement of Points to be relied upon and of Designation of the Parts of the Record to be printed in the above entitled cause will be filed in the Supreme Court of the United States on or before the 21st day of February, A. D. 1932. A copy of the Statement of Points to be relied upon and of Designation of the

Parts of the Record to be printed is served upon you herewith.

W. J. Oven, W. J. Oven, Attorney fo Appellant.

Service accepted this 13th day of February, A. D. 1932.
H. M. Taylor, H. M. Taylor, Counsel of Record and Attorney for Appellee.

[fol. 129] [File endorsement omitted.]

Endorsed on cover: File No. 36,520. Florida Supreme Court. Term No. 706. Seaboard Air Line Railway Company, appellant, vs. A. W. Watson. Filed February 16, 1932. File No. 36,520.

FILE COPY

MAR 3
CHARLES ELMO

Supreme Court of the United States

OCTOBER TERM, 1931

SEABOARD AIR LINE RAILWAY COMPANY, a Corporation,
APPELLANT,
vs.
A. W. WATSON,
APPELLEE.

No. [redacted] 4

Statement of Basis on Which Appellant Contends the Supreme Court of the United States Has Jurisdiction to Review on Appeal the Judgment Appealed From, as Required by Supreme Court Rule 12

W. J. OVEN,
Counsel for Appellant.

Dated February 29, A. D. 1932.

Artcraft Printers, Tallahassee, Florida

Supreme Court of the United States

OCTOBER TERM, 1931

SEABOARD AIR LINE RAILWAY COMPANY, a Corporation,
APPELLANT,
vs.
A. W. WATSON,
APPELLEE.

No. 706

Statement of Basis on Which Appellant Contends the Supreme Court of the United States Has Jurisdiction to Review on Appeal the Judgment Appealed From, as Required by Supreme Court Rule 12

Pursuant to Supreme Court Rule 12, Par. 1, Seaboard Air Line Railway Company, a corporation, the above appellant, files this its statement showing the basis on which said appellant contends that the Supreme Court has appellate jurisdiction to review on appeal the judgment appealed from herein, as follows:

I. The statute believed to sustain appellate jurisdiction is Section 237, the Judicial Code (United States Code Annotated Title 28, Section 344), as amended by the

Act of February 13, A. D. 1925, Ch. 229, 43 Stat. 937, which provides:

> "A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any state, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States." As modified or amended by the Act of January 31, 1928, Chapter 14, 45 Stat. 54, as amended by the Act of April 26, 1928, Ch. 440, 45 Stat. 466, abolishing writs of error in civil cases and providing that all relief which heretofore could be obtained by writ of error should hereafter be obtained by appeal.

II. The judgment or decree appealed from was entered by the Circuit Court of Gadsden County, Florida, March 22, A. D. 1929 (Record pages 10-11*) and affirmed by the said Supreme Court of Florida, upon remittitur, November 12, A. D. 1931 (Record page 87) and rehearing denied January 5th, A. D. 1932. (Record page 94.)

III. The application for an appeal was presented on the 22nd day of January, A. D. 1932, as appears from

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* NOTE.—Paging refers to typewritten transcript—Record not yet printed.

pages 95-98 of the Record herein, and appeal allowed on the same date by the Chief Justice of the Supreme Court of Florida, as appears from pages 109-110 of the Record herein.

IV. The appeal herein is from a judgment of the Supreme Court of the State of Florida, entered November 12th, A. D. 1931 (Record p. 87), in a civil case at law (rehearing denied January 5, A. D. 1932, Record p. 94), affirming conditionally on remittitur a judgment rendered against appellant March 22nd, A. D. 1929, by the Circuit Court of the Second Judicial Circuit of Florida, in and for Gadsden County. (Record pages 10-11.)

V. Appellant contends that the nature of the case and of the rulings below are such as to bring the case within the jurisdictional provisions relied on in this:

(a) Section 7051, Compiled General Laws of Florida, 1927 (Section 4964, Revised General Statutes of Florida, 1920), which provides:

> "A railroad company shall be liable for any damage done to persons, stock or other property, by the running of the locomotives, or cars, or other machinery of such company, or for damage done by any person in the employ and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company,"

is void and repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States. See testimony Record pages 13-15, 24-51; charges of the trial court, Record pages 51-57; motion for new trial, grounds

Nos. 5 to 12, Record pages 58-61; assignments of error before Supreme Court of Florida, Nos. 5 to 12, Record 69-71; assignment of error here, No. 1, Record page 100.

(b) That the application of the Florida statute quoted above to the issues in the case under the evidence submitted deprived the appellant here of its property without due process of law and denied to it the equal protection of the laws guaranteed to it by the Fourteenth Amendment to the Constitution of the United States. (Same pages of the record as preceding paragraph; second assignment of error here, Record p. 100.)

(c) That the Florida Statute quoted above denies to appellant the equal protection of the law guaranteed to it by the Fourteenth Amendment to the Constitution of the United States because the presumption cast upon it, a railroad company, by the statute, is not likewise cast upon auto transportation companies in handling passengers and goods for hire over the public roads of the State of Florida. (Testimony Record pages 34-35.) See 5th to 12th grounds of motion for new trial (Record pages 58-61); 5th to 12th assignments of error (Record pages 69-71); opinion of the Supreme Court of Florida (Record pages 84-85); third assignment of error here (Record page 101.)

(d) The several charges of the Circuit Court to the jury sustained by the Supreme Court of Florida, being severally set forth in the fifth, sixth, seventh, eighth and ninth assignments of error here (Record pages 101-104), and severally the fifth, sixth, seventh, eighth and ninth assignments of error before the Supreme Court of Florida, and being severally the fifth, sixth, seventh, eighth and

ninth grounds of appellant's (defendant below) motion for a new trial, denied to the appellant the equal protection of the law guaranteed to it by the Fourteenth Amendment to the Constitution of the United States. See tesimony, record pages 13-15, 24-51; charges, record pages 51-57; motion for new trial, grounds 5 to 12, record pages 58-61; assignments of error before the Supreme Court of Florida, Nos. 5 to 12, record 69-71.

(e) The appellant was denied due process of law and the equal protection of the law guaranteed to it by the Fourteenth Amendment to the Constitution of the United States by the refusal of the trial Court to give the charge requested by appellant (defendant there) made the basis of the tenth ground of the motion for a new trial in the trial court, and made the basis of the tenth assignment of error in the Supreme Court of Florida, and the basis of the tenth assignment of error here. See testimony record pages 13-15, 24-51; second charge requested, record pages 55-56; tenth ground of motion for new trial, record page 61; tenth assignment of error in the Supreme Court of Florida, record page 71; tenth assignment of error here, record pages 104-105.

(f) The appellant (defendant in the trial court) was denied due process of law and the equal protection of the law guaranteed to it by the Fourteenth Amendment to the Constitution of the United States by the refusal of the trial court to give the charge made the basis of the eleventh ground of its motion for a new trial and the basis of the eleventh assignment of error in the Supreme Court of Florida, and the basis of the eleventh assignment of error here. (Same testimony as above); third charge requested, record pages 56-57; motion for new

trial, record page 61; eleventh assignment of error in the Supreme Court of Florida, record page 71; eleventh assignment of error here, record pages 105-106.

(g) The opinion and decision of the Supreme Court of Florida, construing the Florida Statute quoted above to be similar in operation to the Mississippi Statute construed by the Supreme Court of the United States in the case of Mobile, Jackson & Kansas City Railroad Company vs. J. A. Turnipseed (219 U. S. 35, 31 Sup. Ct. Rep. 156; 55 L. Ed. 78), and by so holding therein that the trial court committed no reversible error in giving the instructions made the basis of the fifth, sixth, seventh, eighth and ninth grounds severally of the motion for a new trial, and the basis of the fifth, sixth, seventh, eighth and ninth assignments of error severally in the Supreme Court of Florida, denied to the appellant here the equal protection of the law guaranteed to it by the Fourteenth Amendment to the Constitution of the United States in this: That with the construction placed upon the Mississippi Statute by this Court and later by the Mississippi Court itself, pursuant to later decisions of this Court, the prima facie rule of evidence obtaining against this defendant in the trial court was met and removed by the testimony of this appellant's employees and the case then became lawfully one for the jury as to the credibility of the witnesses without presumption of any kind; whereas, the jury, by each of the several charges of the trial court and the charge as a whole, took the case to the jury room under such charges with the burden still resting upon the shoulders of the appellant (defendant below) of overcoming the statutory presumption as charged by the trial court. Testimony, record pages 13-15, 24-51; charges, record pages 51-57; motion for

new trial, grounds 5 to 12, record pages 58-61; assignments of error before Supreme Court of Florida, Nos. 5 to 12, record pages 69-71; petition for rehearing before Supreme Court of Florida, record pages 91-94; twelfth assignment of error here, record pages 106-107. See opinion S. A. L. vs. Watson, 137 So. 719, Advance Sheet No. 6, Dec. 24, 1931.

The cases believed to sustain the jurisdiction are as follows:

Western & Atlantic Railroad vs. Henderson, et al., 279 U. S. 639, 49 Sup. Ct. Rep. 445, 73 L. Ed. 884.

Manley vs. Georgia, 279 U. S. 1, 49 Sup. Ct. Rep. 215, 73 L. Ed. 575.

Bailey vs. Alabama, 219 U. S. 219, 31 Sup. Ct. Rep. 145, 55 L. Ed. 191.

New Orleans & G. N. R. Co. vs. Walden, ... Miss....., 133 So. 241.

Abie State Bank vs. Bryan, 282 U. S. 765, 51 Sup. Ct. Rep. 252, 75 L. Ed. 690.

Seaboard Air Line Ry. vs. Simon, 56 Fla. 545, 47 So. 1001.

Smith vs. Cahoon, 283 U. S. 553, 51 Sup. Ct. Rep. 582, 75 L. Ed. 1264.

Truax vs. Corrigan, 257 U. S. 312, 42 Sup. Ct. Rep. 124, 66 L. Ed. 254.

Gulf C. & S. F. R. Co. vs. Ellis, 165 U. S. 150, 17 Sup. Ct. Rep. 255, 41 L. Ed. 666.

Southern Cotton Oil Co. vs. Anderson, 80 Fla. 441, 86 So. 629.

City of Tallahassee vs. Kaufman, 87 Fla. 119, 100 So. 140.

Maxwell vs. Miami, 87 Fla. 107, 100 So. 147.

Respectfully submitted,

W. J. OVEN,
Counsel for Appellant.

Dated February 29, A. D. 1932.

Service of a copy of the above statement is hereby admitted, this the 29th day of February, A. D. 1932.

HUGH M. TAYLOR,
Attorney and of Counsel for Appellee.

FILE COPY

JUN 1
CHARLES ELM

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931.

No. [redacted]6. 4

SEABOARD AIR LINE RAILWAY COMPANY,
APPELLANT,

VS.

A. W. WATSON, APPELLEE.

BRIEF ON BEHALF OF APPELLANT.

W. J. Oven,
Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931.

No. 706.

SEABOARD AIR LINE RAILWAY COMPANY, APPELLANT,

VS.

A. W. WATSON, APPELLEE.

OFFICIAL RECORD BELOW.

The opinion delivered by the Supreme Court of Florida (the Court below) appears reported in

Seaboard Air Line Ry. Co. v. *Watson,* (Florida Report and paging not yet announced) 137 So. 719. See also Tr. pp. 54-61, Petition for Rehearing, Tr. p. 66, Denied, Tr. 66.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 237, Judicial Code (USCA Title 28, Section 344) as amended by the Act of February 13th, A. D. 1925, Chapter 229, 43 Stat. 937, in that the judgment below was a final judgment in a suit in the highest court of the

State of Florida in which a decision in the suit could be had, and there was drawn in question the validity of a Statute of the State of Florida, to-wit, Section 7051, Compiled General Laws of Florida, 1927, (Section 4964, Revised General Statutes of Florida, 1920, Section 3148, General Statutes of Florida, 1906—Section 17, Chapter 4071, Laws of Florida, Acts, 1891) which reads:

> "A railroad company shall be liable for any damage done to persons, stock or other property, by the running of the locomotives, or cars, or other machinery of such company, or for damage done by any person in the employ and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company."

This Statute was taken from and is a duplicate of the Georgia Statute construed and condemned by this Court in

> *Western & Atlantic R. R. Co.* v. *Henderson,* 279 U. S. 639, 73 L. ed. 884, 49 Sup. Ct. Rep. 445.

The construction of the Georgia Statute by the Georgia Courts has been adopted and approved by the Supreme Court of Florida.

> *Atlantic Coast Line R. R. Co.* v. *Beasley,* 54 Fla. 311; 45 So. 761.

The contention was and is made that:

(a) The Statute is unconstitutional and void because it denies to appellant the equal protection of the

laws guaranteed to it by the Fourteenth Amendment to the Federal Constitution for the very reasons and under similar facts pointed out by this Court in the case of

Western & Atlantic R. R. Co. v. *Henderson, supra,*

as the appellant was, under the construction placed upon it, required to prove by a preponderance of the evidence to the satisfaction of the jury that it was *not negligent* as against the allegation of the appellee's complaint that it *was negligent,* in spite of the fact that appellant by its evidence overcame any reasonable *prima facie* rule of evidence raised by proof *only* of injury and damage.

(b) The Statute was and is now (if not, when passed), unjustly discriminatory and therefore in conflict with the Fourteenth Amendment and void, in that appellant (and others likewise situated) was required thereunder to prove, where any damage was done to persons, stock or property by the running of the locomotives, or cars, etc., that its agents had exercised all reasonable care and diligence, the presumption in all cases being against it; whereas, persons, firms or corporations operating motor vehicles for the transportation of passengers and freight for hire on the highways in competition with appellant (and others likewise situated) enjoyed the privilege of the ordinary rule of law that he who alleges negligence must prove it.

Exempli Gratia.

(1)

A travels by bus or train. A collision occurs at a grade crossing between the two passenger vehicles of respective classes. He sues both as joint tort feasors. Under this Statute the defendant railroad company has to prove that it was not negligent and that its agents and servants used all ordinary and reasonable care and diligence, the presumption being against it, while the defendant bus company in the same case can require A to prove that the bus company was negligent and that its agents and servants failed to use the proper degree of care and diligence.

(2)

Appellant's freight train leaves a given terminal for a given destination and a motor truck carrier leaves from the same place for the same destination. Appellant's train travels on appellant's roadbed, the motor freight carrier travels on the public highway. The railroad and the highway run parallel and close to each other. A team from the backwoods attempts to cross both at a country road, crossing the two at right angles. If the team is demolished by the motor vehicle carrier for hire the owner of the team must prove the negligence of such carrier. If demolished by the freight train the railroad company must "make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company."

(3)

If the railroad is that of a lumber company, on which engines and cars hauling logs as an incident to the business of the lumber company, engaged solely in the transportation of such logs, not operating as a common carrier for hire, in case of injury or damage caused by such logging road, regardless of the size, weight, equipment and load of the engines and cars, the burden is upon the one who alleges negligence to prove it; contra, if the railroad is operating as a common carrier, in case of injury or damage sustained by the operation of its engines, trains or cars, regardless of how well equipped and manned, or how light and suitable they may be, the burden is upon that company to show that its agents exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company.

To illustrate the fundamental inequality of the Statute and the State Court's construction thereof as against the principles of equality guaranteed and preserved by the Fourteenth Amendment to the Constitution of the United States, the Court is respectfully requested to compare the holding of the State Supreme Court in the instant case and its decisions therein cited with that of

Fla. Motor Lines v. *Ward*, 102 Fla. ...., ...,
137 So. 163, 166,

wherein the Supreme Court of Florida said:

"To hold that he was guilty of contributory negligence would necessarily imply some negligence

on the part of defendant which does not appear, neither is this a case in which the presumptive evidence rule as prescribed in Section 4964, Revised General Statutes of 1920, (Section 7051, Compiled General Laws of 1927), or the comparative negligence rule as prescribed by Section 4965, Revised General Statutes of 1920, (Section 7052, Compiled General Laws of 1927), may be invoked."

And the case of

Luster v. *Geneva Mill Company,* 102 Fla. ...., ..., 135 So. 854, 855,

wherein the same Court said:

"We have also held that a corporation or company engaged in the operation of a sawmill and operating as an incident to such business an ordinary log road or tram road for the purpose of transporting logs from the forest to the mills, is not a 'railroad company' within the provisions of 4964, 4965 and 4966, Revised General Statutes 1920, Sections 7051, 7052 and 7053, Compiled General Laws of Florida 1927. Here, however, the train was not used solely for transporting logs to the mill of the defendant appellee. While the defendant was engaged in the lumber business, there was undisputed evidence before the Court that it also hauled freight for hire. * * *."

And the case of

J. Ray Arnold Lbr. Co. v. *Carter,* 91 Fla. 548, 559, 108 So. 815, 819,

wherein the Court said:

"A corporation or company engaged in the operation of a sawmill, and operating as an incident to such business an ordinary log road or tram road for the sole purpose of transporting logs from the forest to the mills, is not a 'railroad

> company' within the provision of Sections 4964, 4965 and 4966, Rev. Gen. Stat. 1920. In an action to recover for injuries caused by the running of trains over such a log road or tram road, the presumption of negligence prescribed by Section 4964 *supra*, does not apply, but recovery must be had under the rule that the burden of proving negligence is upon him who alleges it."

And also, in the case of

> *Grace* v. *Geneva Lumber Co.*, 71 Fla. 31, 34, 70 So. 774.

wherein the Court said:

> "If the defendant company was, in fact, doing the business of a railroad company, the Statute would apply, even though the name of the company and its primary business indicated that of a lumber or milling company."

(c) That the refusal by the trial court and the affirmation of such ruling by the State Appellate Court of a requested charge to the jury (the above Statute notwithstanding) setting forth the rights and duties of the traveller on the highway and the railroad company operating its trains on its own track, as defined by this Court in the case of

> *Baltimore & Ohio R. R. Co.* v. *Goodman*, 275 U. S. 66, 72 L. ed. 167, 48 S. C. R. 24,

deprived the appellant of the due process of law and of the equal protection of the laws guaranteed to it by the Fourteenth Amendment.

(d) That the construction by the Supreme Court of Florida upon the Statute when this case was before it on writ of error and on petition for rehearing,

resulted, by the effort of that Court to explain or reason out of the Florida Statute the vice pointed out by this Court in the Georgia Statute (identical in language) and overruling the assignments of error taken as against said charges, and thereby sustaining them, in depriving this appellant of the due process of law and the equal protection of the laws guaranteed to it by the Fourteenth Amendment to the Federal Constitution as pointed out by this Court in the case of

Western & Atlantic RR. Co. v. *Henderson, supra,*

and as subsequently followed by the Supreme Court of Mississippi in the case of

N. O. & G. N. R. Co. v. *Walden,* 160 Miss. 102, 133 So. 241,

and as followed by the Supreme Court of the State of Georgia, after the Statutes of that State, in obedience to the mandate of the Henderson case, had been redrafted and reenacted to conform to the Mississippi Statute, and thereafter construed in

S. A. L. Ry. Co. v. *Fountain,* 173 Ga. 593, 160 S. E. 789,

in this:

While the case stood under the pronouncement of this Court on an equal basis as between the litigants at the close of the evidence, with the scales of justice balanced, and the lawful burden then resting upon the plaintiff in the trial court to establish to the satisfaction of the jury by a preponderance of the evidence that this appellant as defendant below was negligent, yet the trial court in each of the several charges

complained of in the Specification of Errors assigned, to-wit, Nos. 5, 6, 7, 8, 9, 10, 11 and 12, and each of them severally, gave the jury to understand that the burden of proof, after they retired to their room, rested still upon the shoulders of this appellant here to convince them by a preponderance of the evidence that its agents and servants had exercised all ordinary and reasonable care and diligence in the premises. In short, while under the rule laid down by this Court in the Henderson case, *supra,* and the Turnipseed case (from Mississippi) distinguished therein, the case should have gone to the jury on the evidence, with the scales of justice equally balanced, to be weighed accordingly by the jury, yet the Court by these charges, severally, and collectively, bore down upon the plaintiff's side of that scale in the trial court and told the jury that still, with all the evidence before them, it was not necessary that they must find that the plaintiff had made out his case, but that the presumption was against the defendant before them until their verdict found otherwise. If the charges so given in the instant case and so sustained by the construction of the Supreme Court of Florida stand, then it is submitted that the pronouncement of this court in the case of *Western & Atlantic* v. *Henderson, supra,* is nullified and amounts to naught within the State of Florida, regardless of the fact that the Constitution of the United States follows the flag.

Therefore, it is respectfully submitted:

That the State Statute attacked is, as it reads and as construed by the Supreme Court of Florida, unconstitutional and void; and, as a consequence, this Court, by virtue of the Acts of Congress, the rules of this Court and the appeal herein allowed by the Chief Justice of the Supreme Court of Florida (Tr. 75-76), has jurisdiction hereof.

STATEMENT OF THE CASE.

Though the amount involved herein is of little consequence, yet the principle involved and the *constitutional rights* of appellant (and all others likewise situated) is of far reaching importance. Hence, this appeal.

The action was begun by the appellee in the Circuit Court of Gadsden County, Florida, to recover damages for the killing of two mules and damage to a wagon by collision with appellant's train at a public road crossing. Appellee alleged that the damage resulted from the negligent operation of the train at a high, rapid and excessive rate of speed and appellant's failure to give warning by the blowing of the whistle, or otherwise, of the approach of the train. (Tr. p. 2.) Appellant plead not guilty and contributory negligence. (Tr. pp. 2-5.) Trial was had, verdict returned for the plaintiff and judgment entered upon the verdict. (Tr. p. 6.) On the issues made by the pleadings appellee proved the injury (and value) and rested. (Tr. pp. 8-11.) Appellant

then, compelled to meet the presumption cast upon it by the quoted Statute, proved by the various members of the train crew that the whistle had been duly blown, that the bell was rung, that the operation of the train was not at an excessive rate of speed; and also that the plaintiff's servant, had he used ordinary care, could have avoided the accident.

Appellant also offered to prove that as between Jacksonville and Tallahassee, and possibly between Tallahassee and Pensacola, (paralleling appellant's line) it had bus line competition.

In rebuttal appellee attempted to show, by testimony more negative than positive, that the whistle was not sounded in time.

Thereupon, the Court charged the jury, imposing in its charge as a whole, and in each and every charge severally, the *presumption* of negligence upon appellant, letting the jury take with it to the jury room such presumption, notwithstanding the proof of the appellant tending to show that it had not been negligent in the respects complained of in the declaration.

The Court also refused certain charges requested by appellant, the refusal of which it is also contended deprived appellant of due process of law and the equal protection of the laws guaranteed by the Fourteenth Amendment. The several charges given which are complained of were duly excepted to severally and exceptions noted, and likewise exceptions duly noted to the refusal of the Court to give certain charges requested.

As the evidence will be briefly reviewed in the argument and the substance of said several charges will be set forth in the Specifications of Error and argument thereunder, further mention thereof here is omitted.

After verdict motion was duly made in the trial court for a new trial, motion overruled and exception noted. (Tr. pp. 42-47.) Bill of exceptions was allowed and duly settled. (Tr. p. 49.) Writ of error was then sued out to the Supreme Court of Florida. (Tr. p. 50.) The motion for a new trial (Tr. pp. 43-45), the assignments of error presented to the trial judge at the time of applying for settlement of the bill of exception, (Tr. pp. 46-49) and the complete assignments of error upon which the case went to the Supreme Court of Florida (Tr. pp. 51-53), and the petition to that Court for rehearing (Tr. pp. 63-66) raised consistently through each step in the consideration of the case in the Trial and State Appellate Court the several constitutional questions presented in the assignments of error presented to the Chief Justice of the Supreme Court of Florida at the time of applying by petition for this appeal. (Tr. pp. 69-75.)

The case is brought here on direct appeal allowed by order of the Chief Justice of the Supreme Court of Florida. (Tr. pp. 75-76.) Appellant adopted its assignments of error as a Statement of Points to be Relied Upon. (Tr. p. 78.)

SPECIFICATIONS OF ASSIGNED ERRORS INTENDED TO BE URGED.

Appellant urges each of the several assigned errors. They are briefly outlined as follows:

Assignment of Error No. 1.

(Tr. p. 69.)

The State Court erred in holding Section 7051 Compiled General Laws of Florida (Section 4964 Revised General Statutes of Florida, 1920), to be valid and not repugnant to Section I of Article XIV of the Constitution of the United States.

Assignment of Error No. 2.

(Tr. p. 69.)

The State Court erred in holding that the scope and effect of the Statute did not in the trial of the cause deprive appellant of due process and the equal protection of the laws.

Assignment of Error No. 3.

(Tr. pp. 69-70.)

The State Court erred in holding that the Statute was not discriminatory because no similar presumption was cast upon auto transportation companies handling passengers and goods for hire over the public roads.

Assignment of Error No. 4.

(Tr. p. 70.)

The validity of the Statute was questioned upon the ground that it was repugnant to the Fourteenth Amendment to the Constitution of the United States, and the State Court erred in sustaining its validity.

Assignment of Error No. 5.

(Tr. p. 70.)

The State Court erred in sustaining the charge to the jury based upon the Statute to the effect "that a railroad company shall be liable for any damage done to stock or property of another by the running of locomotives or cars unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company."

Assignment of Error No. 6.

(Tr. pp. 70-71.)

The State Court erred in sustaining the charge to the jury which instructed: "Therefore, although the standard of care and duty required by the law of persons in crossing railroad tracks is such as I have stated and should be applied in this case, yet, if you find from the evidence that the damage alleged was caused by the running of the defendant's railroad locomotive and train of cars on its tracks, there may be a recovery for the damage done, unless the defendant company shall make it appear by a preponderance of the evi-

dence that its employees exercised all ordinary and reasonable care and diligence in the premises."

Assignment of Error No. 7.

(Tr. p. 71.)

The State Court erred in sustaining the charge: "And if both the servant of the plaintiff and the employees of the railroad company were at fault in causing the damage alleged, there may be a recovery but the damage should be reduced in proportion to the contributory negligence of the plaintiff's servant."

Assignment of Error No. 8.

(Tr. p. 72.)

The State Court erred in sustaining the charge to the jury that if they believed from the evidence that the injury occurred by the operation of appellant's train and that its agents did not use reasonable and proper care in the operation thereof and did not give warning of the approach thereof, they should find for the plaintiff "unless the defendant company has made it appear by a preponderance of the evidence that its agents and employees used due care—all ordinary and reasonable care and diligence in the operation of said locomotive and train."

Assignment of Error No. 9.

(Tr. pp. 72-73.)

The State Court erred in sustaining the charge to the jury that if they found the damage was caused jointly by the alleged negligence of appellant and contributed to by the alleged negligence of plaintiff's serv-

ant, that they might still find for the appellee, but that his damage should be diminished in proportion to the contributory act of his servant.

Assignment of Error No. 10.

(Tr. p. 73.)

The State Court erred in sustaining the refusal of the trial court to give the second charge requested by appellant, which sets forth substantially the rule of law laid down by this Court in the case of Baltimore & Ohio Railroad Co. vs. Goodman.

Assignment of Error No. 11.

(Tr. p. 74.)

The State Court erred in sustaining the refusal of the trial court to give the third charge requested by appellant, which sets forth substantially the rule of law laid down by this court in the case of Baltimore & Ohio Railroad Co. vs. Goodman.

Assignment of Error No. 12.

(Tr. pp. 74-75.)

The State Court erred in sustaining the charges given by the trial court upon the theory and conclusion that they were sustained by the decision of this Court in the case of Mobile, Jackson & Kansas City R. R. Co. vs. Turnipseed.

Assignments numbered 1, 2 and 4 will be argued together.

Assignments numbered 5 to 9, inclusive, embracing the several charges to the jury construing the Statute attacked, which construction appellant contends as to each charge deprived it of its constitutional rights, will be consolidated.

ARGUMENT.

SUMMARY OF THE FACTS.

Appellee proved by his servant the collision and resulting damage. (Tr. pp. 8-13.) On cross the servant admitted he could not see far down the track, that the range of vision was not quite 200 yards, that he could see "kinda cattacornered" before he got to the track. (Tr. p. 10.) After proof as to value plaintiff rested. (Tr. p. 13.)

Appellant then proved by its engineer Lee that one team was seen to cross ahead of him and another, the one that was struck, shortly followed. The automatic air bell attached to the engine was ringing. Witness whistled at the whistle post for the crossing and then again. He was making an ordinary speed of forty to forty-five miles an hour, not operating carelessly, train properly equipped, and made application of emergency brakes. The brakes responded; train could not have been stopped more quickly. He continued to blow as he reached the crossing. (Tr. p. 15.)

Appellant's fireman Hayes testified that the engineer sounded the crossing signal some three hundred yards from the crossing; that the bell was ringing. (Tr. p. 16.) The engineer put on his brakes. It was a seven-car train; the train responded readily to the

brakes; that the engineer was something like three hundred yards from the crossing when the first blast was sounded. (Tr. p. 17.)

Appellant's brakeman Ben Johnson testified that a signal whistle was sounded for the road crossing, the bell was ringing, the brakes were applied and the train stopped in about a length. (Tr. p. 18.)

Appellant's conductor Thomas, in charge of the train, testified it was running from Jacksonville to River Junction to connect there with the L. & N. handling Pullmans for New Orleans, La. The accident occurred about 3:30 in the afternoon; the crossing signal was sounded before reaching the crossing; he heard it. Witness could not say with reference to the bell, not being positive; the whistle was being sounded when the emergency brakes were applied. The brakes responded promptly; the train could not have stopped sooner. Speed about 35 or 38 miles—regular speed. Nothing could have been done to avoid the accident. (Tr. p. 20.) No defective equipment, no negligent handling of the train.

Appellee's driver, Lasaw Richardson, admitted to the conductor that he wasn't paying much attention and did not realize the train was coming until he got right on the track and then he halted his mules and attempted to back them off the track. (Tr. p. 21.) (Note: This statement was never denied by appellee's driver—Lasaw Richardson, who had testified as to the collision and resulting injury.)

Mrs. D. K. Kelly, a nearby resident, testified for appellant, that she was not far from the crossing, saw the accident just as the train hit; that the train blew before the wagon was struck; when it blew she got up and went out on the porch and saw the train approaching. The driver of the wagon did not seem to notice the train; he seemed unconcerned when the train first blew. The bell on the engine was ringing before the train stopped. When she got up and went out on the porch the train was coming; she looked around for her boy, stood there "a few minutes" and the mule team was coming; when she turned to go back she heard the screech of the brakes and looked back and the driver had the mules reared back trying to back them. The whistle blew more than one time; it continued blowing a second time. She was not connected with appellant. (Tr. p. 24.)

P. H. Tharp saw the wagons crossing and saw the smoke of the train. He heard the blow for the crossing; one made it across and witness stated to A. W. Tharp, "Look at them fools." "He thought he could make it over too and he kind of slashed the mules with his lines, then tried to stop, and couldn't make it." (Tr. p. 25.) Witness paid no attention to the bell but heard the train blow. Appellee's driver appeared to stop and look for the train, yet he appeared to think he could make it over and the train was too close; he saw he could not and ran out the back end of the wagon. (Tr. p. 26.)

A. W. Tharp, for appellant, testified that he was at the crossing, saw the wagons when they started across,

but the train happened along and blew and appellee's driver kept coming and did not stop his mules at all, then stopped and tried to back them off but couldn't do so. Witness heard the train blow before it got to the crossing; paid no attention to the bell. The second wagon was the one that had the collision. (Tr. p. 28.)

Conductor Thomas also testified that he knew of bus competition as against appellant as between Jacksonville and Tallahassee, Florida, but did not know personally of competition as between Tallahassee and Pensacola; also, that he considered the view of the track at that point clear. (Tr. p. 22.)

Appellee, in rebuttal to appellant's testimony, produced one Joe Woodberry, who testified that he was in his field when the accident happened, less than a quarter of a mile from the crossing; that he could see and *hear* the train coming, that it did not blow at the post; that it was fifty yards from the crossing when it did blow; that it was going thirty or forty miles an hour when it blew. (Tr. p. 32.) On cross he admitted that he saw the train sound the whistle after it passed the blow post; he could not see the crossing from where he stood. He could see the last coaches of the train about the time the engine got on the crossing, then it went behind the tobacco barn and he could see no more; it blew after that; witness did not know where the team was when the whistle sounded. (Tr. p. 33.) Witness was looking at the train; it was making a little fuss running along. It made a good deal of fuss and he could hear it half a mile according to the wind. (Tr. p. 34.)

Charley Hayes, a witness for appellee, testified that the train was right there at "Mr. Joe's (Woodberry's place) when it blowed for the crossing," about a hundred yards, he guessed. The train blew "toot," "toot," "toot," and hit something; the "tooting" and the "hitting" was about the same time. The train was about a hundred yards from the crossing when it first blew. (Tr. p. 34.)

Ed Jones, a witness for appellee, testified that he saw the train going along that day; he was working for Mr. Woodberry; that it was fifty or sixty yards from where they were when it blew, and shortly after that he heard a rumbling up near the crossing. If the train blew at the blow post he paid no attention. Witness heard it blow twice, "right short." (Tr. p. 36.)

Naturally, as in every case tried, each of the several witnesses differed somewhat in their testimony on cross examination.

Here the case rested and the charges later complained of in the argument were given by the Court to the jury, and those requested in behalf of appellant refused by the Court.

POINTS OF FACT.

The Points of Fact sought to be stressed by the foregoing summary of the testimony are:

1. The case is on "all fours" with that of *Western & Atlantic* v. *Henderson, supra.*

2. The evidence in the instant case in behalf of appellant was far stronger and the evidence in behalf of appellee as weak, if not much weaker, than the evidence for the appellant and appellee respectively, as reflected by the decision of this court in *Western & Atlantic Railroad Company* v. *Henderson, supra.*

3. It is clear from the record that the case is one similar in point of fact to that of

Baltimore & Ohio R. Co. v. *Goodman*, 275 U. S. 66, 72 L. ed. 167, 48 Sup. Ct. Rep. 24,

and should have been ruled by that case, the Statute of Florida to the contrary notwithstanding.

POINTS OF LAW.

The Points of Law to be argued under the Specifications of Error are:

1. The Statute denies appellant and those likewise situated (Railroad Companies) the equal protection of the law, because it requires Railroad Companies to carry throughout the trial a burden not cast upon other litigants.

2. The Statute is void and discriminatory in that it imposes upon appellant and those likewise situated (Railroad Companies) a burden not imposed upon motor carriers for hire.

3. The Statute as construed by the Supreme Court of the State of Florida, the court of last resort in said State, imposes upon appellant and those likewise situated (Railroad Companies) a burden through-

out the trial of any cause in which it is invoked that is not cast upon other litigants.

4. The refusal of the trial court, because of the Statute in question, sustained by the State Appellate Court, to give the second charge requested by the defendant, which invoked the rule of law laid down by this Court in the Goodman case, *supra,* deprived appellant of due process of law and the equal protection of the law.

5. The refusal of the trial court, because of the Statute in question, sustained by the State Appellate Court, to give the third charge requested by the defendant, which invoked the rule of law laid down by this Court in the Goodman case, *supra,* deprived appellant of due process of law and the equal protection of the law.

With the summary of the evidence and points of fact and of law outlined above, the several Specifications of Error urged will now be argued.

FIRST POINT OF LAW.

The Statute Denies Appellant and Those Likewise Situated (Railroad Companies) the Equal Protection of the Law, Because It Requires Railroad Companies to Carry Throughout the Trial a Burden Not Cast Upon Other Litigants.

Assignment of Errors No. 1, No. 2 and No. 4.

It is respectfully submitted that the above point of law is raised under Assignment of Errors No. 1

(Tr. p. 69), No. 2 (Tr. p. 69), No. 4 (Tr. p. 70), and in fact each subsequent assignment (Tr. p. 70) down to and including the 9th Assignment (Tr. pp. 72-73).

A comparison as between the Statute of the State of Florida heretofore quoted and that of the State of Georgia, Section 2780 of Georgia Civil Code, shows them to be identical. This Court, in *Western & Atlantic R. Co.* v. *Henderson, supra,* in a case tried under circumstances which appear to be exactly similar to the trial of the case at bar, reversed the Supreme Court of Georgia, which affirmed on certiorari the Georgia Court of Appeals (167 Ga. 22, 144 S. E. 905), concluding:

> "That (the Statute) of Georgia as construed in this case creates an inference that is given effect of evidence to be weighed against opposing testimony and is to prevail unless such testimony is found by the jury to preponderate. The presumption raised by § 2780 is unreasonable and arbitrary and violates the due process clause of the Fourteenth Amendment." Citing: *Manley* v. *Ga.*, 279 U. S. 1, 49 Sup. Ct. Rep. 215, 73 L. ed. 575; *McFarlin* v. *American Sugar Co.*, 241 U. S. 79, 36 Sup. Ct. Rep. 498, 60 L. ed. 899; *Bailey* v. *Ala.*, 219 U. S. 219, 31 Sup. Ct. Rep. 145, 55 L. ed. 191. *Western & Atl. R. R. Co.* v. *Henderson,* 279 U. S. 639, 644, 73 L. ed. 884, 888, 889.

To sustain the Statute the Supreme Court of Florida in its opinion heretofore cited, in sustaining the judgment against appellant, quoting from a former case, said:

> "In determining the legality and effect of a statutory regulation, the Court should ascertain

the legislative intent; and, if the ascertained intent will permit, the enactment should be construed and effectuated so as to make it conform to, rather than violate, applicable provisions and principles of the State and Federal Constitutions, since it must be assumed that the Legislature intended the enactment to comport with the fundamental law. And a statute must be so construed, if fairly possible, as to avoid, not only the conclusion that it is unconstitutional, but also grave doubts upon that score. *Burr* v. *Florida East Coast Ry. Co.*, 77 Fla. 259, 81 So. 464."

(.... Fla. ...., 137 So. 719, 723) (Tr. p. 59).

The opinion of the State Court sets forth the contention of appellant but brushes it aside upon the apparent theory that while both statutes are worded alike, the Georgia Statute had one effect and the Florida Statute had another effect, relying upon

Seaboard Air Line Ry. Co. v. *Thompson*, 57 Fla. 155, 48 So. 750.

Yet, reference to the Thompson case shows that the Supreme Court of Florida there reversed a case under somewhat similar circumstances to the one involved here; that the constitutional question involved here was not there raised, but, conversely, reference to the record in the present case shows that the Statute was construed by the trial court in the instant case similar to the construction placed upon it by the Georgia Court in the case reversed by this court, and the instant case, notwithstanding such construction, was affirmed by the Florida Supreme Court.

Briefly, it is submitted that the Statute speaks for itself and the facts in the two compared cases speak

for themselves and permit of but one determination by this court, viz., that the Statute is unconstitutional.

The well recognized rule of this court that it will follow the State Court's construction of a state statute is not lost sight of in this argument. But it is submitted that where, as in the instant case, the Statute plainly says one thing, the Court construes it to mean another, but notwithstanding, that construction gives to the Statute, as it has done in the instant case, the same effect as the plain language of the Statute without judicial construction, that then the constitutional rights guaranteed to the appellant have been invaded and the Statute must necessarily be held invalid.

In support of its reasoning to the effect that the Statute attacked is not invalid and that the instant case is not controlled by that of *Western & Atlantic* v. *Henderson, supra,* the Supreme Court of Florida proceeds with the reasoning by reference to the case of

Mobile & K. C. R. Co. v. *Turnipseed,* 219 U. S. 35, 55 L. ed. 78, 31 Sup. Ct. Rep. 136,

referring to the law as there construed, as a statute quite similar in its operation to the Florida Statute, and that such on appeal to this Court from the Supreme Court of Mississippi was held constitutional, the Florida Court, through its Commissioner, stating:

> "That the only legal effect of the inference was to cast upon the railroad company the duty of producing some evidence to the contrary. When that was done, the inference was at an end and the question of negligence was one for the jury upon all the evidence." (Tr. p. 60—137 So. 719, 723.)

This statement being taken from the language of this Court in the Turnipseed case, *supra*, by the Florida Court, yet, what was the effect and result so far as the appellant's constitutional rights were concerned? If the only legal effect of the inference was to cast upon the appellant the duty of producing some evidence to the contrary, then certainly, under this record it could not and cannot be said that such was not done. If such was done and the Court charged the jury that the presumption of negligence still obtained (as it did) and, as against objections to such charges upon the ground that they deprived this appellant of its rights, it is submitted that the construction so placed by the Florida Supreme Court upon its Statute unquestionably, in the light of its own language, deprived the appellant of its constitutional rights.

Furthermore, if the Statute is similar to that of the Statute of Mississippi, sustained in effect by this Court in the Turnipseed case, would not the rule of law as to charging the jury under the facts shown in the instant case be that followed by the Mississippi Court rather than that followed by the Georgia Court construing the Statute condemned by this Court? In response to the decision of this Court in the Henderson case, the Supreme Court of Mississippi, in the case of

N. O. & G. N. R. Co. v. *Walden*, 160 Miss. 102, 115, 133 So. 241, 245, 246,

where a case somewhat similar to the present one had been tried, said:

> "The sixth rule in the Thornhill case comes clearly within the condemnation of the Henderson

case, and, if that rule is based on a correct interpretation of the Statute, then the Statute also comes within its condemnation. But, as hereinbefore set forth, that rule is not based on a correct interpretation of the Statute, and therefore it becomes our imperative duty to overrule the cases announcing or applying it."

And the Court then also said:

"What we here hold, and all we do now hold, is that when in an action for damages from an injury of the character described in the Statute, the facts and circumstances of the injury are given in evidence by the plaintiff at any stage of the trial, whether it conflicts with similar evidence of the defendant or not, or are given in evidence by the defendant only, and which evidence the jury is without right to reject, *no instruction should be given to the jury on the statutory presumption.*" (Italics by writer.)

In the case of

Seaboard Air Line Ry. Co. v. *Fountain*, 173 Ga. 593, 596, 600, 160 S. E. 789, 790, 792,

which was a case with facts similar to the instant case, and one tried after the decision of this Court in the Henderson case, and after the State of Georgia had adopted the Mississippi Statute, in the language of the Georgia Court, "*in totidem verbis*," the Supreme Court of Georgia, in construing that Statute, on October 15, 1931, where the trial court had charged the jury as follows:

"And in this connection I will charge you this, that in all cases against railroad companies for damages done to persons or property, proof of the

> injury inflicted by the running of the locomotives or cars of such companies shall be *prima facie* evidence of the lack of reasonable skill and care on the part of the company. But this, of course, is subject to rebuttal. If the railroad company shows to your satisfaction that they did exercise the care required by the law to be exercised, that they were not guilty of such negligence, then, of course, that presumption, if there be such, (*prima facie* I should have said instead of presumption), and I withdraw the presumption, would be rebutted;"

said:

> "Thus the Supreme Court of the United States by clear implication holds that the Mississippi Statute which we have under consideration would be unconstitutional and void if the Supreme Court of that State had held that it had any greater effect than to create a mere inference which would disappear whenever the railroad company introduced any evidence tending to disprove the existence of such negligence. In view of the construction of the Mississippi Statute by the Supreme Court of that State and the Supreme Court of the United States, we feel constrained to hold that the instruction complained of by the railroad company was erroneous and that a new trial should be granted."

Consequently, assuming now that by the decision of the Supreme Court of Florida in the instant case that the Florida Statute is similar in effect to the Mississippi Statute, notwithstanding the decision of the Supreme Court of Mississippi, *supra*, rendered March 23, 1931, and the decision of the Supreme Court of Georgia rendered October 16, 1931, the decision of the Florida Supreme Court being rendered November 7, 1931, we have

in effect one Statute for the three states with the Constitution of the United States applying in one way to a Statute in the States of Georgia and Mississippi and in a different way to the Statute of the State of Florida.

Hence, we submit that the Statute is, in and of itself as written, and by its plain language, and as construed in the instant case by the Supreme Court of Florida, unconstitutional and void, because it denies to the appellant the equal protection of the law for the several reasons set forth under the four sub-heads, (a), (b), (c) and (d), heretofore discussed with reference to the jurisdiction of this Court.

Another vice in this Statute which appellant contends is fatal is the discriminatory application to appellant, and others likewise situated, placed upon it by the State Supreme Court in the cases of *Luster* v. *Geneva Mill Co., supra, J. Ray Arnold Lbr. Co.* v. *Carter, supra,* and *Grace* v. *Geneva Lumber Company, supra,* which grounds the application of the Statute, not upon the police power invoked to protect the citizen from injury or damage to persons and property by the operation of dangerous instrumentalities, but solely upon the ground that the Statute applies to those railroads only which handle passengers or goods for hire. Stated otherwise, under the construction of the State Court, if appellant, or any other railroad company, was operating engines and cars upon a railroad track, the presumption of negligence cast by the Statute applies to it if and because it handles for hire one passenger or one carton of cigarettes or a sack of flour, regardless of how well

the equipment is maintained and operated; while on the other hand the operator perchance, over the same track or over another railroad track, of a log train hauling logs as an incident to its own business, regardless of how heavy the train is, how poorly manned or negligently equipped, no such presumption attaches in case of injury or damage to the citizen caused by the operation of this log train. And again, though in the last mentioned cases the question of common carriage for hire and of dangerous instrumentalities is made the basis for sustaining the alleged unjust discrimination, yet the same Court, in the case of *Florida Motor Lines* v. *Ward, supra,* holds that (notwithstanding the busses of the Florida Motor Lines handle passengers for hire) the Statute is not applicable to the motor vehicle carrier for hire. This point will be further discussed under the succeeding point of law.

SECOND POINT OF LAW.

The Statute Is Void and Discriminatory In That It Imposes Upon Appellant and Those Likewise Situated (Railroad Companies) a Burden Not Imposed Upon Motor Carriers for Hire.

Assignment of Error No. 3.

This point is raised under Assignment of Error No. 3 (Tr. pp. 69-70), and indirectly under each of the preceding assignments.

The contention is that appellant, a railroad company, engaged in common carriage by rail, is denied the equal protection of the law because the Statute casts upon it a presumption of negligence when any

injury or damage occurs from the operation of its engines, trains or cars, whereas, no such presumption is cast upon auto transportation companies handling passengers and property for hire.

In presenting this point we submit that early decisions bearing upon the question are of little value because they relate to a period in the history of Florida when auto transportation companies were unknown and state highways were a dream.

The legislative history of Florida shows that the State first considered the building of State highways in 1915, and that gradually the legislative program was worked up until a most comprehensive system of highways was planned and authorized and financial aid provided for the construction thereof by an excise tax levied on gasoline.

When this Statute was passed as Section 17 of Chapter 4071 Laws of Florida, Acts of 1891, we submit that the courts judicially know that there were no modern highways in Florida and that even in the country generally, and certainly not in Florida, auto transportation companies operating as carriers for hire were unknown. Also, on the other hand, that during and after the construction of the highway system in the State this business so grew and developed that certain legislative regulations were passed, and competition by motor vehicle for hire existed when the collision involved here occurred.

Chap. 6881 Laws of Florida, Acts of 1915, p. 187, (An Act relating to the licensing of motor vehicles used for hire or otherwise.)

Chap. 6883 Laws of Florida, Acts of 1915, p. 190; (An Act providing for the creation of the State Road Department.)

Chap. 7275 Laws of Florida, Acts of 1917, p. 29; (An Act amending Chap. 6881 *Ibid.*)

Chap. 7328 Laws of Florida, Acts of 1917, p. 161; (Amending Chap. 6883 *Ibid.*)

Chap. 7737 Laws of Florida, Acts of 1918, p. 48; (Amending former acts.)

Chap. 7899 Laws of Florida, Acts of 1919, p. 252; (Amending the Act relative to the State Road Department.)

Chap. 7900 Laws of Florida, Acts of 1919, p. 254; (Amending the Act relating to the State Road Department.)

Sections 1192-1202, Revised General Statutes of Florida, 1920.

Chap. 8410 Laws of Florida, Acts of 1921, p. 47; (Relating to license taxes on motor vehicles used for hire and otherwise.)

Chap. 8411 Laws of Florida, Acts of 1921, p. 60; (Imposing a license tax of 1¢ per gallon on gasoline to be used in the construction of State roads.)

Chap. 8553 Laws of Florida, Acts of 1921, p. 355; (Authorizing any county or road district to aid in the construction of State roads.)

Chap. 8575 Laws of Florida, Acts of 1921, p. 384; (Levying 1 mill to meet Federal aid in State road construction.)

Chap. 9120 Laws of Florida, Acts of 1923, p. 27; (An Act imposing license tax of 3¢ per gallon gasoline to be used in State road construction.)

Chap. 9311 Laws of Florida, Acts of 1923, p. 367; (Designating and establishing a system of State roads.)

Chap. 9312 Laws of Florida, Acts of 1923, p. 371; (An Act relating to the State Road Department, prescribing its duties and powers.)

Chap. 10025 Laws of Florida, Acts of 1925, p. 12; (Increasing the gasoline tax for State roads from 3¢ to 4¢ per gallon.)

Chap. 10182 Laws of Florida, Acts of 1925, p. 370; (Amending previous Acts relating to the licensing of motor vehicles used for hire or otherwise.)

Chap. 10186 Laws of Florida, Acts of 1925, p. 388; (Regulating the operation of motor vehicles on State highways.)

Chap. 10269 Laws of Florida, Acts of 1925, p. 493; (Amending Chap. 9311 designating certain State roads.)

See also the case of

Lewis v. *Leon County,* 91 Fla. 118; 107 So. 146, 150, 151.

And in 1929 the regulation thereof was placed by the State under the jurisdiction of the Railroad Commission. See Chap. 13700 Laws of Florida, Acts of 1929, p. 348. And further, more strict and more comprehensive legislation was enacted to cover and control the situation and to meet certain defects in the Act of 1929, pointed out by this court in the case of

Smith v. *Cahoon,* 283 U. S. 553, 75 L. ed. 1264, 51 Sup. Ct. Rep. 582.

See

Chapters 14764 Laws of Florida, Acts of 1931, p. 486, 15625 Laws of Florida, Acts of 1931, p. 1090.

The Supreme Court of Florida has very recently sustained legislation permitting common carriers on the highways to operate with a greater gross weight than permitted to private vehicles.

Tyson v. *Stoutamire*, ... Fla. ....; 140 So. 454, (Adv. Sheet #3, Apr. 21, 1932.)

The foregoing statutes and the decision of the State Court in Lewis vs. Leon County are cited solely and only for the purpose of bringing to the attention of this Court the status of the State when the Statute here attacked was passed, as compared with the situation with reference to the operation of motor vehicles, and especially motor vehicles for hire, when the collision occurred and at the present time.

"This court takes judicial notice of this legislation."

Abie State Bank v. *Bryan*, 282 U. S. 765, 778; 75 L. ed. 690, 704; 51 S. C. R. 252.
Owens v. *Hull*, 9 Pet. 607, 625; 9 L. ed. 246, 252.
Hanley v. *Donohue*, 116 U. S. 1, 6; 29 L. ed. 535, 537; 6 Sup. Ct. Rep. 242.
Lloyd v. *Matthews*, 155 U. S. 222, 227; 39 L. ed. 128, 130; 15 Sup. Ct. Rep. 70.

It is well settled by the decisions of this court that

"A police regulation, although valid when made, may become, by reason of later events, arbitrary and confiscatory in operation."

Abie State Bank v. *Bryan*, 282 U. S. 765, 772, 75 L. ed. 690, 701; 51 Sup. Ct. Rep. 252.
Smith v. *Ill. Bell Teleph. Co.*, 282 U. S. 133, 162; 75 L. ed. 255, 270; 51 Sup. Ct. Rep. 65.

Allen v. *St. L. I. M. & S. R. Co.*, 230 U. S. 553, 555, 556; 57 L. ed. 1625, 1627, 1628; 33 Sup. Ct. Rep. 1030.

Lincoln Gas & E. L. Co. v. *Lincoln*, 250 U. S. 256, 268; 63 L. ed. 968, 976; 39 Sup. Ct. Rep. 454.

This brings us to the question of what is to be considered a just basis for the regulation sought by the Statute as construed by the Supreme Court of Florida to be imposed upon appellant and others likewise situated.

In the cases of *Luster* v. *Geneva Mill Co., supra, J. Ray Arnold Lbr. Co.* v. *Carter, supra, and Grace* v. *Geneva Lumber Company, supra*, the State Court made the clear distinction that if the railroad was not being operated solely for the transportation of logs, but was hauling any freight for hire, then the Statute would apply. In short, these decisions place the application of the Statute as resting solely upon a carrier for hire. If that be a just basis, and by such construction saved the Statute from being condemned as discriminatory and contrary to the Fourteenth Amendment, then upon what reasonable basis, we pray, can it be sustained as applying to appellant when the same court holds, in a case against a motor carrier for hire—

> "Neither is this a case in which the presumptive evidence rule as prescribed in Section 4964, Revised General Statutes of 1920, (Section 7051 Compiled General Laws of 1927), or the comparative negligence rule as prescribed by Section 4965, Re-

vised General Statutes of 1920, (Section 7052, Compiled General Laws of 1927), may be invoked."
Florida Motor Lines v. *Ward, supra.*

In the case of

Seaboard Air Line Ry. Co. v. *Simon,* 56 Fla. 545, 47 So. 1001,

the Supreme Court of Florida, in considering there a statute which provided "that any person, firm or corporation operating any railroad in this State" should, within ninety days after the filing of a claim for the loss of or damage to any shipment, pay the claim, and upon failure so to pay "then they shall pay the said claimant the sum of 25% per annum on the principal sum of said claim, and when the said claimant shall bring suit and recover for his claim • • • he shall be allowed in said suit the said 25% per annum in addition to the principal sum of said claim and have judgment therefor;" provided, the recovery was greater than the sum tendered.

There the railway company attacked the Statute upon the ground that it was discriminatory because the Statute was limited in its operation to only one class of common carriers of goods, to-wit, railroads. The Supreme Court of Florida in passing upon the Statute said:

> "An unreasonable classification of persons or corporations for the purpose of legislative regulation that would be burdensome to those included in the class regulated, leaving others who are similarly conditioned with reference to the subject

regulated free from the regulation and burden, may be an arbitrary exercise of governmental powers."
(56 Fla. 549, 47 So. 1002.)

It also held that the subject regulated was not peculiar to railroads, but was equally and similarly applicable to all common carriers of goods, whether the service was rendered by the use of railroads, boats or other means. After making this finding and holding the State Court disposed of the Statute there questioned in this language—

> "The classification adopted should have some just relation to, or reasonable basis in, essential differences of conditions and circumstances with reference to the subject regulated, and should not be merely arbitrary; and all similarly situated or having similar legal duties and obligations in regard to the subject regulated, should be included in one class, at least where there are no practical differences that are sufficient to legally warrant a further or special classification in the interest of the general welfare."
>
> 56 Fla. 552, 47 So. 1003, citing; McGehee Due Process of Law, 56 *et seq.*; *Jones* v. *Brim*, 165 U. S. 180, 41 L. ed. 677; 17 Sup. Ct. Rep. 282;
>
> *In re Van Horne* (N. J. Ch.), 70 Atl. 986;
>
> *Ind. Tr. & Term. Co.* v. *Kinney* (Ind.), 85 N. E. 954.

So it would seem if carriage for hire is to be made a reasonable basis for a just classification then the Statute is unjustly discriminatory because it places a burden upon appellant and other railroad companies that it does not place upon persons, firms and corporations handling for hire, as either common, contract or

private carrier, goods over the highways of the State. But, it may be argued that the test to be applied is that the railroad company is engaged in the operation of dangerous instrumentalities and that the use of such by them is a just basis for the classification. This question begs two answers. First, if such be the test then can it be said that the instrumentalities used on a log road are any less dangerous than those used on the common carrier railroad, especially in view of the fact, which the courts know, that every possible safeguard has been thrown around the operation of these instrumentalities by Congress where such are used in the handling of interstate commerce; and the courts also know that in this day and time the operation of a railroad in intrastate commerce only is an impossibility. Second, conceding that dangerous instrumentalities is a proper test for the classification attempted by the Statute, then still it is unjustly discriminatory in that it does not apply to the motor vehicle carrier for hire because those very vehicles have been held by the very same Court to be dangerous instrumentalities.

City of Tallahassee v. *Kaufman*, 87 Fla. 119; 100 South 150.

Maxwell v. *City of Miami*, 87 Fla. 107, 100 So. 147.

Florida Motor Transportation Company v. *Hillman*, 87 Fla. 512; 101 So. 31.

Shaw v. *State*, 88 Fla. 320, 102 So. 550.

Herr v. *Butler*, 101 Fla. 1125, 132 So. 815.

Greene v. *Miller*, 102 Fla. ...., 136 So. 532.

In *Herr* v. *Butler, supra,* quoted with approval in *Greene* v. *Miller, supra,* the Supreme Court of Florida (101 Fla. 1125-1127, 132 So. 815, 816) said:

> "It appears that this case comes well within the rule as stated in the case of *Southern Cotton Oil Co.* v. *Anderson,* 80 Fla. 441, 86 So. 629, 16 A. L. R. 255, in which the Court say:
>
> 'A motor vehicle operated on the public highways is a dangerous instrumentality, and the owner who intrusts it to another to operate is liable for injury caused to others by the negligence of the person to whom it is intrusted * * *.
>
> 'An automobile operated upon the public highways being a dangerous machine, its owner is responsible for the manner in which it is used, and his liability extends to its use by any one with his knowledge or consent.
>
> 'The Legislature, under its police power to protect the public from dangerous instrumentalities using the highways, has imposed rigid restraints, regulations and restrictions upon the use of motor vehicles, thus recognizing the danger from their operation, which makes owners liable in damages under the doctrine of *respondeat superior* as applied to dangerous agencies.
>
> 'Chapter 7275, Acts 1917, treats the automobile when operated on the public highways as a dangerous instrumentality, so as to require special regulation and control under the police power, and it is not divested of its dangerous character in an action for damages caused by the negligence of the operator, who is using the car with the owner's knowledge or consent.' "

Therefore, it is submitted that the evolution of the transportation problem has now placed motor vehicle carriers, with respect to the Statute herein complained of, on the same plane and in the same

class with other common carriers, and that unquestionably the Statute is now unjustly discriminatory and void.

> "The 14th Amendment, 'in declaring that no State shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended, not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoilation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; *that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs,* and the enforcement of contracts; that *no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition,* and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses." (Italics that of the writer.)
>
> *Barbier* v. *Connolly,* 113 U. S. 27, 31; 28 L. ed. 923, 924, 5 Sup. Ct. Rep. 357, 359.
>
> *Yick Wo* v. *Hopkins,* 118 U. S. 356, 369; 30 L. ed. 220, 226; 6 Sup. Ct. Rep. 1064, 1070.
>
> *Connoly* v. *Union Sewer Pipe Co.,* 184 U. S. 540, 559; 46 L. ed. 679, 689, 22 Sup. Ct. Rep. 431.

THIRD POINT OF LAW.

The Statute As Construed by the Supreme Court of the State of Florida, the Court of Last Resort in Said State, Imposes Upon Appellant and Those Likewise Situated (Railroad Companies) a Burden Throughout the Trial of Any Cause in Which It Is Invoked That Is Not Cast Upon Other Litigants.

Assignment of Errors Nos. 5, 6, 7, 8, 9 and 12.

This point, as the writer sees it, involves severally the Assignment of Errors numbered 5 to 9, inclusive (Tr. pp. 70-73), and also the last or 12th numbered error assigned. (Tr. pp. 74-75.) These several errors assigned reach severally and collectively to the construction placed upon the Statute by the trial and State Appellate Court as applied to the facts in the case at bar, and to the consequent effect of such construction upon appellant because of the decision of the State Supreme Court sustaining the several charges given and the charge of the Court as a whole.

Fifth Assignment of Error.

(Tr. p. 70.)

This is based upon the Court's charge to the jury at the conclusion of the case in the language of the Statute, "That a railroad company shall be liable for any damage done to stock or property of another by the running of locomotives or cars *unless the company shall make it appear* that their agents have exercised *all* ordinary and reasonable care and diligence, the

presumption in *all cases* being against the company." (Italics by writer.)

This charge in full appears in the record. (Tr. p. 38.) It was excepted to and made a ground of motion for a new trial (Tr. p. 43); assigned as error upon settlement of bill of exceptions (Tr. p. 46); assigned as error before the Supreme Court of Florida. (Tr. p. 51.)

It is submitted clearly that this charge bore down the scales of justice as against the appellant and in favor of the appellee and thereby deprived appellant of its constitutional rights before the jury; because, under the doctrine laid down by this Court in the Henderson case, with the evidence adduced, it had then become simply a question for the jury to determine whether or not the appellee had made out his case to their satisfaction by a preponderance of the evidence without having the jury to understand, as it was given to understand by this charge, that notwithstanding the evidence adduced by appellant tending to show it was not negligent, the burden still rested upon appellant in the jury room to overcome the presumption they were given to understand existed. The Court might just as well, by this and other charges complained of here, have, in other words, said to the jury: "The injury has been proven and you should go to your room and find a verdict for Mr. Watson, unless the railroad had convinced you that it was guilty of no negligence. While Mr. Watson has made the charge, the railroad must disprove it to your satisfaction."

But the Supreme Court of the State has said by its opinion that there was no error in the giving of this charge because, in effect, the Statute, (being in the exact language of the Georgia Statute) is to be and has been construed according to the Statute of Mississippi; and yet, with the utmost respect, as we have heretofore shown, both the Mississippi Court and the Georgia Court have condemned charges of this nature. Hence, the judgment of the Supreme Court from which this appeal is taken, in sustaining the charge, adopts in language the Mississippi law, but through its judicial power enforces the Georgia Statute condemned by this Court. Therefore, it is respectfully submitted, under the authorities previously cited and the argument heretofore made, that appellant was clearly deprived of its constitutional rights as contended for throughout this proceeding. The record demonstrates, if anything, an overzealous and possibly a redundant effort to insist throughout the proceeding upon the appellant's constitutional rights. It cannot be said that this is a case where the Federal question was not raised below.

While it is well settled that the construction by a state court of a constitutional or statutory provision of the State will be controlling upon and followed by this Court, yet that rule must, and has always been held by this Court to, yield to another, and of even greater importance, which is, that where such construction deprives the litigant of the equal protection clause of the Constitution this Court will then go into the facts of the case, apply the Statute or the State Constitutional provision and reach its own conclusion as to whether or not

the litigant appealing to it has been denied the rights guaranteed by the Fourteenth Amendment. If such were not the holding of this Court the Fourteenth Amendment could be, and in some cases doubtless would be, shorn of all force and effect.

In

Truax v. *Corrigan*, 257 U. S. 312, 325, 66 L. ed. 254, 259, 42 Sup. Ct. Rep. 124,

this Court said:

> "Nor does the *Court's declaration* that the statute is a *rule of evidence bind us in such an investigation. Bailey* v. *Alabama*, 219 U. S. 219, 238, 239, 55 L. ed. 191, 200, 31 Sup. Ct. Rep. 145; *Chicago M. & St. P. R. Co.* v. *Minnesota*, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; *Mugler* v. *Kansas*, 123 U. S. 623, 661, 31 L. ed. 205, 210, 8 Sup. Ct. Rep. 273; *Corn Products Ref. Co.* v. *Eddy*, 249 U. S. 427, 432, 63 L. ed. 689, 693, 39 Sup. Ct. Rep. 325. In cases brought to this Court from State Courts for review, on the ground that a Federal right set up in the State Court has been wrongly denied, and in which the State Court has put its decision on a finding that the asserted Federal right has no basis in point of fact, or has been waived or lost, this Court, as an incident of its power to determine whether a Federal right has been wrongly denied, *may go behind the finding to see whether it is without substantial support.* If the rule were otherwise, it almost always would be within the power of a State Court practically to prevent a review here. *Kansas City Southern R. Co.* v. *H. Albers Commission Co.*, 223 U. S. 573, 591, 593, 56 L. ed. 556, 565, 566, 32 Sup. Ct. Rep. 316; *Cedar Rapids Gas Light Co.* v. *Cedar Rapids*, 223 U. S. 655, 668, 669, 56 L. ed. 594, 604, 32 Sup. Ct. Rep. 389; *Southern P. Co.* v. *Schuyler*, 227 U. S.

601, 611, 57 L. ed. 662, 669, 43 L. R. A. (N. S.) 901, 33 Sup. Ct. Rep. 277. *Another class of cases in which this Court will review the finding of the Court* as to the *facts* is when the *conclusion* of *law* and *findings* of *fact* are so *intermingled* as to *make it necessary,* in order to pass upon the question, *to analyze the facts. Northern P. R. Co.* v. *North Dakota,* 236 U. S. 585, 593, 59 L. ed. 735, 740 L. R. A. 1917F, 1148, P. U. R. 1915C, 277, 35 Sup. Ct. Rep. 429, Ann. Cas. 1916A, 1; *Jones Nat. Bank* v. *Yates,* 240 U. S. 541, 552, 553, 60 L. ed. 788, 797, 798, 36 Sup. Ct. Rep. 429. In view of these decisions and the ground upon which they proceed, it is clear that in a case like the present, where the issue is whether a state statute, in its application to facts which are set out in detail in the pleadings and are admitted by demurrer, violates the Federal Constitution, this Court must analyze the facts as averred, and draw its own inferences as to their ultimate effect, and is not bound by the conclusion of the State Supreme Court in this regard. The only respect in such a case in which this Court is bound by the judgment of the State Supreme Court is in the construction which that Court puts upon the statute." (Italics by writer.)

Sixth Assignment of Error.

(Tr. pp. 70-71.)

This is based upon the charge of the Court reading in part: "Therefore, although the standard of care and duty required by law of persons in crossing railroad tracks is such as I have stated and should be applied in this case, yet, if you find from the evidence that the damage alleged was caused by the running of defendant's railroad locomotive and train of cars on its tracks, there may be a recovery for the damage done, unless the defendant company shall make it appear by a

preponderance of the evidence that its employees exercised all ordinary and reasonable care and diligence in the premises."

The charge in full appears in the record. (Tr. pp. 38-39.) It was excepted to and made a ground of motion for new trial (Tr. p. 43); assigned as error upon settlement of bill of exceptions (Tr. 47); assigned as error before the Supreme Court of Florida. (Tr. pp. 51-52.)

What has been said under the previous assignments applies likewise here and it is prayed that it be so treated and considered.

Seventh Assignment of Error.

(Tr. pp. 71-72.)

This is based upon the Court's charge to the jury: "And if both the servant of the plaintiff and the employee of the railroad were at fault in causing the damage alleged there may be a recovery, but the damage should be reduced in proportion to the contributory negligence of the plaintiff's servant."

This charge in full appears in the record. (Tr. p. 39.) It was excepted to and made a ground of the motion for new trial (Tr. p. 44); assigned as error upon settlement of bill of exceptions (Tr. p. 47); assigned as error before the Supreme Court of Florida. (Tr. p. 52.)

Briefly stated, the contention is that following immediately the two preceding charges of the Court, the vice with which it is claimed they were infected

attaches to this charge and consequently bore unjustly upon appellant's constitutional rights.

What has been said under the previous assignments applies likewise here and it is prayed that it be so treated and considered.

Eighth Assignment of Error.

(Tr. p. 72.)

This assignment is based upon the charge of the trial court sustained by the State Appellate Court to the effect that if the jury believed from the evidence that the injury occurred by the operation of appellant's train and that its agents did not use reasonable and proper care in the operation thereof, and did not give warning of the approach thereof, they should find for the plaintiff, "unless the defendant company has made it appear by a preponderance of the evidence that its agents and employees used due care—all ordinary and reasonable care and diligence in the operation of said locomotive and train."

The charge appears in full in the record. (Tr. p. 39.) It was excepted to and made a ground of the motion for new trial (Tr. p. 44); assigned as error upon settlement of the bill of exceptions (Tr. pp. 47-48); assigned as error before the Supreme Court of Florida. (Tr. p. 52.)

What has been said under previous assignments applies likewise here and it is prayed that it be so treated and considered.

Ninth Assignment of Error.

(Tr. pp. 72-73.)

This is based upon the court's charge to the jury to the effect that if they found the damage was caused jointly by the alleged negligence of the appellant and contributed to by the alleged negligence of plaintiff's servant, that they might still find for the appellee, but that his damage should be diminished in proportion to the contributory act of his servant.

The charge appears in full in the record. (Tr. pp. 39-40.) It was excepted to and made a ground of the motion for new trial (Tr. pp. 44-45); assigned as error upon settlement of bill of exceptions (Tr. p. 48); assigned as error before the Supreme Court of Florida. (Tr. p. 53.)

It is contended that following the other charges throwing the presumption upon the appellant, notwithstanding the evidence adduced, that in connection therewith it was infected with the same vice and the appellant deprived of the equal protection of the law accordingly.

What has been said under the previous assignments applies likewise here and it is prayed that it be so treated and considered.

Twelfth Assignment of Error.

(Tr. pp. 74-75.)

This assignment relates to the construction of the Statute involved by the charges of the trial court given as a whole and the decision of the Supreme Court of the State of Florida sustaining the judgment of the lower

court against appellant rendered upon the verdict following such charges, and to the judgment of the Supreme Court in its construction of the Statute sustaining, as against the several errors assigned there, based upon the charges of the trial court.

Appellant's contention, briefly stated in the outset here, being that while the Statute reads similar to the Georgia Statute condemned by this court, the State Supreme Court by its decision said that it meant what a Mississippi Statute said that had been sustained by this court, yet the effect of such holding that there was no error in the charges given at the trial of the case places the operation of the Statute in a class with, and gives to it the same force and effect as, the Georgia Statute previously condemned by this Court.

The Supreme Court of the State, sustaining the charges given by the trial court under the Statute involved, cites as authority for its holding

> *Seaboard Air Line Ry.* v. *Thompson,* 57 Fla. 155, 157, 48 So. 750,

and other cases. Yet, with all due respect, we submit that while that decision, if it had been applied to the facts in this case as appellant contends it should have been, might have saved the Statute from condemnation as in conflict with the appellant's constitutional rights under the rule pronounced by this Court in the Henderson case; yet, the very language in the Thompson case which might have saved the Statute from the criticism made here was obviously omitted, or rather disregarded, by the trial court, and apparently by the

State Supreme Court, because, in the Thompson case Mr. Justice Taylor, then speaking for the Court and quoting from the Crosby case referring to the presumption sought to be cast by the Statute, said:

> "This presumption ceases when the railroad company has made it appear that its agents have exercised all ordinary and reasonable care and diligence. In the presence of such proof by the railroad company the jury do not take any such presumption with them to the jury room in weighing the evidence and in coming to a determination. The Statute does not create such a presumption as will outweigh proof or that will require any greater or stronger or more convincing proof than any other question at issue. *All that the Statute does is to cast upon the railroad company the burden of affirmatively showing that its agents exercised all ordinary and reasonable care and diligence, and here the statutory presumption ends.*" (Italics by writer.)

By reference to the record (Tr. p. 40), it will be found first, that the Court refused to give the charge as requested by the appellant, and, second, gave the charge as modified in the following language:

> "The presumption of negligence cast upon railroads by our Statute in personal injury cases ceases when the railroad company has made it appear by a preponderance of the evidence that its agents have exercised all ordinary and reasonable care and diligence. In the presence of such proof by the railroad company the jury do not take any such presumption with them to the jury room in weighing the evidence and in coming to a determination. The Statute does not create such a presumption as will outweigh proof or that will require

> any greater, or stronger or more convincing proof to remove it."

That part of the construction of the Statute given in the Thompson case as taken from the Crosby case which is italicized was deleted by the Court. The Court had previously all through charged the jury that the burden was upon this appellant to, in effect, purge itself of negligence. (Tr. pp. 38-40.) Consequently, the jury, composed of laymen, could not by any ordinary process of reasoning have weighed and determined the questions of construction as involved in the charge as a whole, and the result upon appellant was, it is contended, in effect, practically the same as if the Court had simply charged them that the burden was upon the appellant to prove by a preponderance of the evidence that the resulting injury and damage sustained was *not* due to its negligence.

It certainly cannot be said on this record, from the evidence and the charges given consequent thereupon, that the jury went to their room to consider the case understanding, from a clear, concise charge of the Court with regard to the statute in question, that

> "All that the Statute does is to cast upon the railroad company the burden of affirmatively showing that its agents exercised all ordinary and reasonable care and diligence, and here the statutory presumption ends."

Clearly, had the trial court taken that which appellant contends was the correct view of the case, the jury would not have been charged on the question of

the presumption of negligence, and had the State Supreme Court taken that view one or more of the assignments of error based upon exceptions to the charges given and to the denial of the motion for a new trial would have been sustained and the case reversed.

So, it is respectfully submitted here, that to have saved the Statute from condemnation in the instant case the trial court under the evidence should have done one of two things: (a) Let the case go to the jury as any case would ordinarily go, with the burden resting upon him who alleged negligence; or, (b), at least the jury should have been charged that under the *evidence submitted* they did *not* take any *statutory presumption* against appellant with them to the jury room, and this only as to the Statute.

It may be urged that the record does not show that appellant asked for proper instructions on this point.

> "But the defendant's failure to ask proper instructions does not cure the error in the instructions which were given and excepted to."
>
> *St. Paul Fire & Marine Ins. Co.* v. *Bachman*, ... U. S. ...., 76 L. ed. (Advance Sheet No. 8), 355, 358. Decided Feby. 23, 1932.

Consequently, we submit it is clear under the decisions of this Court that the appellant was deprived of rights guaranteed to it by the Fourteenth Amendment by the judgment of the Supreme Court of Florida in sustaining against the assignment of errors urged there the charges given by the trial court and duly excepted to by appellant.

FOURTH AND FIFTH POINTS OF LAW.

Fourth.

The Refusal of the Trial Court, Because of the Statute In Question, Sustained by the State Appellate Court, to Give the Second Charge Requested by the Defendant, Which Invoked the Rule of Law Laid Down by This Court In the Goodman Case, Supra, Deprived Appellant of Due Process of Law and the Equal Protection of the Law.

And

Fifth.

The Refusal of the Trial Court, Sustained by the State Appellate Court, to Give the Third Charge Requested by the Defendant, Which Invoked the Same Rule of Law.

Assignment of Errors Nos. 10 and 11.

The Fourth Point of Law above questions the refusal of the trial court, sustained by the State Appellate Court, to give the second charge requested by the defendant. It is made the basis of Assignment of Error No. 10. (Tr. p. 73.)

The charge was requested and denied at the conclusion of the trial (Tr. pp. 40-41), and made the basis of the 10th ground of the motion for a new trial (Tr. p. 45); made the basis of the 10th Assignment of Error upon settlement of the bill of exceptions (Tr. p. 48); and made the basis of the 10th Assignment of Error before the Supreme Court of Florida. (Tr. p. 53.)

The Fifth Point of Law reaches to the same question, except that the conclusion of the third charge

requested was worded somewhat differently. It is made the basis of Assignment of Error No. 11. (Tr. p. 74.) The third charge requested by the defendant was also denied by the trial court. (Tr. p. 41.) It was made the basis of the 11th ground of the motion for a new trial. (Tr. p. 45); made the basis of the 11th Assignment of Error upon settlement of the bill of exceptions (Tr. p. 48); and the basis of the 11th Assignment of Error before the Supreme Court of Florida. (Tr. p. 53.)

These two points of law will be argued together, as each reaches to the same constitutional right of appellant, the only substantial difference in the language of the two charges refused being the conclusion.

Assignment of Error No. 10.

(Tr. pp. 73-74.)

The second charge requested by the defendant in the trial of the cause reads as follows:

> "I charge you as a matter of law that the standard of care required of a person in crossing a railroad track to be applied in actions to recover damages for injuries sustained by collision with a train at a railroad crossing is that when a person drives upon a railroad track, he knows that he goes to a place where he will be killed or sustain damage if a train comes upon him before clearing the track. He knows he must stop for the train, not the train stop for him. On such circumstances, if a driver of a vehicle cannot be sure otherwise whether a train is dangerously near, he must stop and get out of his vehicle (although, obviously, he will not often be required to do more than to stop and to look), and if you find from the evidence that the driver of plaintiff's vehicle could by the applica-

tion of such standard of care have avoided the injury, but that he failed to stop and look for the approach of the train, then I charge you that the plaintiff, because of such negligence of the driver of the vehicle and team, is barred of recovery and your verdict should be for the defendant."

It is submitted that with the exception of the conclusion quoted above the language clearly charges the law of the case as laid down by this Court in the case of

Baltimore & Ohio R. Co. v. *Goodman*, 275 U. S. 66, 72 L. ed. 167, 48 Sup. Ct. Rep. 24.

The charge substantially, if not almost identically, follows the language of Mr. Justice Holmes in the Goodman case. Such being the rule of law as laid down by this Court with regard to crossing accidents of this kind, it is respectfully submitted that the charge should not have been refused, and the effect of the doctrine destroyed by the trial court stating partially the substance of this Court's ruling and then in effect telling the jury that it did not apply in Florida because of the Statute attacked in this proceeding.

Therefore, it is respectfully contended that the refusal of the charge as requested, under the law of the land as laid down by this Court in the Goodman case and the Henderson case, *supra*, deprived appellant of due process of law and the equal protection of the law.

As to this charge it may be urged that it does not involve a question of which this Court has jurisdiction to review. The answer is submitted that it gave in the language of this Court the law of the land upon the

subject of the respective rights and duties of the traveler on the highway at railroad crossings. Such rights and duties were inherently interwoven with, and also subject to, the application of the Statute attacked to the facts involved in the case before the Court. It is quite clear that both State Courts so treated it. The facts, except as to the gravity of the result, were practically identical with those in the Goodman case. The charge of the trial court under the Statute attacked was the same as that of the Georgia Court in the Henderson case.

Therefore, it is submitted that this assignment as before this Court brings into play its settled doctrine:

> "But where the non-federal ground is so interwoven with the other as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other, our jurisdiction is plain."
>
> *Abie State Bank* v. *Bryan*, 282 U. S. 765, 773; 75 L. ed. 690, 51 Sup. Ct. Rep. 252.
>
> *Enterprise Irrig. Dist.* v. *Farmers Mutual Canal Co.*, 243 U. S. 157, 61 L. ed. 644, 37 Sup. Ct. Rep. 318.

Assignment of Error No. 11.

(Tr. p. 74.)

What has been said under the preceding assignment applies here as well. If the conclusion of the second charge requested, the refusal of which was made the basis of the 10th Assignment, was erroneous, and justified such refusal as a matter of practice under the State law, such could not have been, and was no

ground for, the refusal of the third charge requested and made the basis of this assignment. The third charge requested was similar to the second requested, with the exception of the conclusion which reads:

> "I charge you that if you find from the evidence in this case that the employees of the defendant used all ordinary and reasonable care under the circumstances in the operation of the defendant's train, then the plaintiff is chargeable with the negligence of his servant, the driver, and the plaintiff would be barred from recovery, and your verdict should be for the defendant."

Conclusion.

In conclusion, it is respectfully submitted that each of the several numbered errors assigned are well taken, have been sustained, and that the cause should be reversed.

Further, it is submitted that should the Court be of the opinion that the appellant is not entitled to an appeal under the facts and circumstances shown in this cause, that then the said appeal can be, and appellant prays that it may be, treated as a petition for a writ of certiorari and this cause disposed of accordingly under the Statute and Rules of this Court.

Sec. 237 (c) Judicial Code as amended by Act of February 13, 1925, Ch. 229, 43 Stat. 937, Title 28, Sec. 344 (c) USCA p. 206.

Respectfully submitted,

W. J. Oven,
Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931.

No. [illegible]6. 4

SEABOARD AIR LINE RAILWAY COMPANY,
APPELLANT,

VS.

A. W. WATSON, APPELLEE.

BRIEF ON BEHALF OF APPELLEE.

JOHN E. MATHEWS,
H. M. TAYLOR,
Counsel for Appellee.

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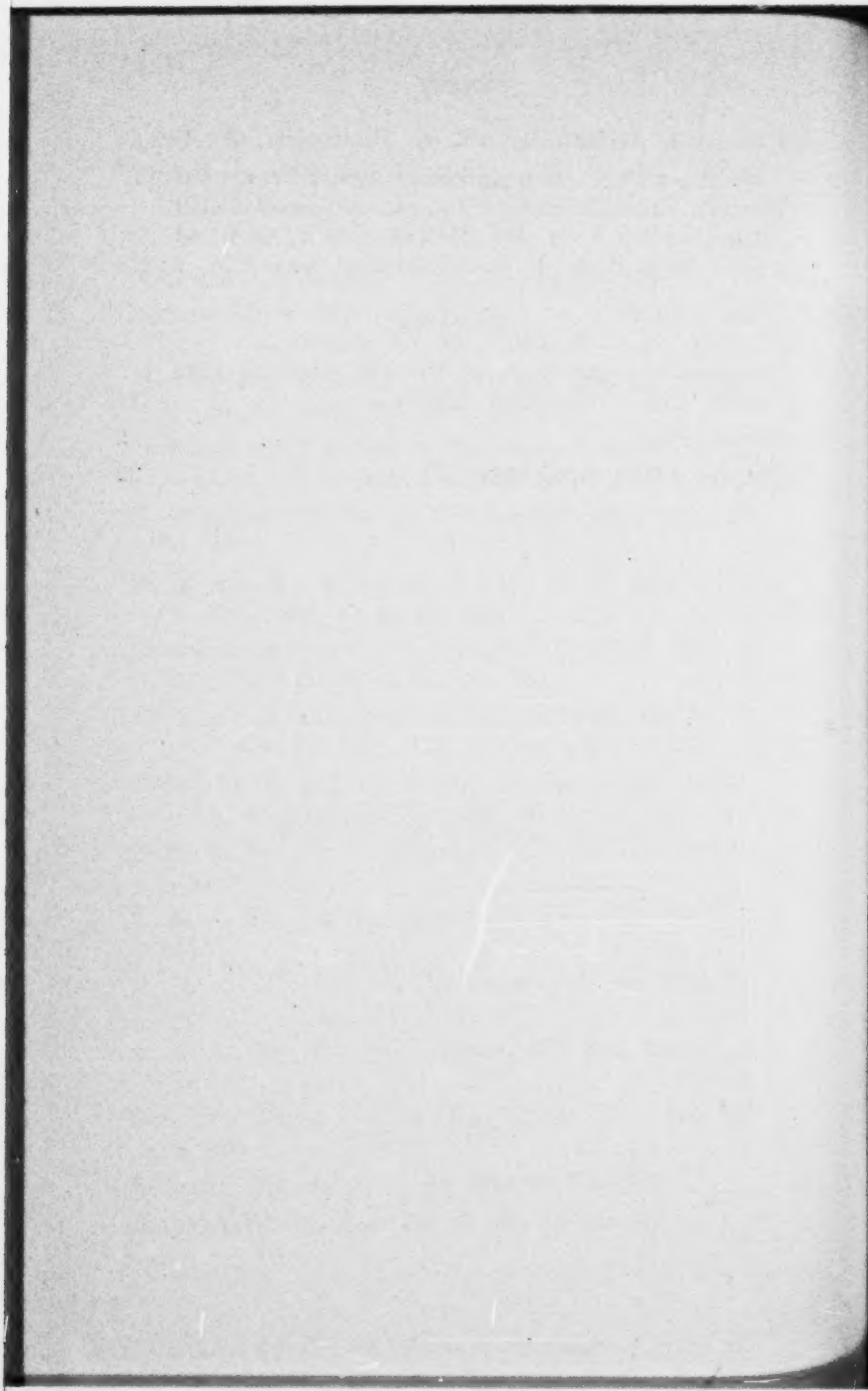

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931.

No. 706.

SEABOARD AIR LINE RAILWAY COMPANY, APPELLANT,

VS.

A. W. WATSON, APPELLEE.

OFFICIAL REPORT BELOW.

The opinion delivered by the Supreme Court of Florida in the case appears reported as

Seaboard Air Line Railway Company v. *Watson*, 137 So. 719. Official Florida Reports Volume and page not yet published. Transcript pages 54-61, 66.

JURISDICTION.

The appellant in its brief invokes the jurisdiction of this Court, contending that it has been deprived of the equal protection of the law in violation of the

Fourteenth Amendment to the Constitution of the United States in four particulars:

(a) It is contended that Section 7051, Compiled General Laws of Florida, 1927, which reads as follows:

> "A railroad company shall be liable for any damage done to persons, stock or other property, by the running of the locomotives, or cars, or other machinery of such company, or for damage done by any person in the employ and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company,"

is unconstitutional under the rule laid down in the case of:

> *Western & Atlantic Railroad Company* v. *Henderson*, 279 U. S. 639, 73 L. Ed. 884, 49 Sup. Ct. Rep. 445.

This contention is based largely upon the erroneous premise adopted by appellant:

> "Appellant by its evidence overcame any reasonable *prima facie* rule of evidence raised by proof only of injury and damage" (Appellant's Brief p. 3).

This premise is not supported by the evidence.

This argument also fails to take into consideration the difference in the construction of the Florida Statute adopted in the case at bar and the construction of the Georgia statute adopted in the Henderson case. Appellee contends that the Florida Statute as construed

in this case is in complete harmony with the decision of this Court in the case of:

Mobile & K. C. R. Co. v. *Turnipseed*, 219 U. S. 35, 55 L. Ed. 78, 31 Sup. Ct. Rep. 136.

This will be discussed more fully under the assignments of error.

(b) It is contended that the statute offends against the Fourteenth Amendment in that it applies to railroad companies who are common carriers, but does not apply to common carriers using motor vehicles as their means of transportation, and in that it does not apply to private individuals who are not common carriers who use private railroads in the conduct of their private business.

The Florida statute above quoted as construed by the Supreme Court of the state does not apply to railroads which are not common carriers. The Court judicially knows that this class is limited to short lines operated in connection with saw mills, mines and industrial plants and that such railroads operate under essentially different conditions from those under which the great common carrier railroad systems of the country operate. We submit that there is a reasonable ground for classification of railroads which are public utilities operating as common carriers as a separate class distinct from common carriers by motor vehicles and as distinct from privately operated railroads.

This point will also be more fully discussed under the assignments of error.

(c) That the trial court refused to charge the jury in accordance with the principle of law laid down by this Court in the case of

> *Baltimore and Ohio Railroad Company* v. *Goodman,* 275 U. S. 66, 72 L. Ed. 167, 48 Sup. Ct. Rep. 24,

and thus deprived the appellant of due process of law. That case was one originating in the Federal Courts and was reversed upon the facts and no question of constitutional law was raised, and the evidence seems to have been essentially different from that and the case at bar and the Court decided no question of constitutional law in its ruling. The only matter which the Court can consider on this appeal in the case at bar is whether or not appellant's constitutional rights have been invaded in this case.

We submit, however, that the Court in its general charge (R. 38) charged the jury substantially in accordance with this decision and its charge in this connection has received the approval of the Supreme Court of Florida. There is certainly evidence sufficient to support a finding that the appellant's servants were negligent and the lower court held that appellee's servant was negligent and required an apportionment of the damages between the two under the Florida Statute of comparative negligence.

(d) The fourth ground upon which appellant claims this Court has jurisdiction is but a repetition of the first, and we respectfully refer the Court to the authorities cited thereunder and the argument hereinafter contained.

We submit that the Florida Statute being attacked and the conduct of the trial of this case in no way deprived the appellant of any constitutional right and that the appeal should be dismissed.

STATEMENT OF THE CASE.

The outline of the case as contained in appellant's brief (pages 10 to 12, inclusive), is in the main correct, but we would point out certain inaccuracies.

First: It is asserted that in the charge the Court let:

> "The jury take with it to the jury room such presumption notwithstanding the proof of the appellant tending to show that it had not been negligent in the respects complained of in the declaration."

The Court charged the jury very emphatically:

> "The presumption of negligence cast upon railroads by our statutes in personal injury cases ceases when the railroad company has made it appear by a preponderance of the evidence that its agents have exercised all ordinary and reasonable care and diligence. In the presence of such proof by the railroad company, the jury do not take any such presumption with them into the jury room in weighing the evidence and in coming to a determination. The statute does not create such a presumption as will outweigh proofs, or that will require any greater or stronger or more convincing proof to remove it" (R. 40).

Thus we see that *if* the Railroad Company by its evidence relieved itself of the burden of jury that its

agents were free from negligence, the jury were charged not to take the presumption with them into their room.

Second: The evidence as to negligence on the part of appellant's employees is conflicting. The appellant's employees contradicted each other in several particulars. Their testimony is summarized by the Supreme Court of Florida in its opinion (R. 56-57), and shows that even from the testimony of appellant's own witnesses the conclusion could logically be drawn that the whistle of the train did not blow until the train was practically on the crossing and when any warning to appellee's servant came too late. This conclusion is substantiated by the testimony of appellee's witnesses as summarized by the Supreme Court of Florida (R. 57).

SPECIFICATIONS OF ASSIGNED ERRORS INTENDED TO BE URGED.

The assignments of error appear on pages 13 to 16 of appellant's brief and need not be recited here.

ARGUMENT.

Summary of Facts.

The testimony of the witnesses, particularly those for the appellant, is very conflicting. Some of it tends to show, as appellant urges, that the whistle of the train was blown some distance from the crossing and an emergency warning sounded just as the train arrived at the crossing.

However, looking at the testimony from another angle, it becomes apparent that this is not true. The conductor of the train, Thomas, testified, that the brakes were applied when the whistle was being sounded (R. 20). Hayes, the fireman, testified that the whistle was not blown after the crossing signal (R. 17). The engineer, Lee, was not the regular engineer on this run (R. 21). Johnson, the porter, testified that the train moved only about a train length after the brakes were applied (R. 18). The train was seven cars long and stopped with the last coach on the crossing (R. 20). From this testimony we cannot but reach the conclusion that the whistle was not sounded until the locomotive was already on or within a few feet of the crossing when any warning was too late. This is established by the appellant's own witnesses. It is also thoroughly substantiated by the direct and positive testimony of disinterested witnesses for appellee (R. 32-34, 36).

The record not only establishes the fact that the jury was justified in finding from the evidence that the

train was being operated negligently, but that such finding is sustained by the preponderance of the testimony as a whole.

In this state of the testimony, the Court charged the jury as set forth in the record, pages 37 to 42, inclusive. An examination of the charge as a whole makes it clear that the Court gave the jury a fair, impartial and unbiased charge upon which a verdict of the appellee was rendered.

Points of Fact.

In the division of appellant's brief bearing the above heading, counsel for appellant made three statements:

First: It is asserted that the case at bar is on "all fours" with the Henderson case. An analysis of the two cases which will presently be made, clearly demonstrates that the cases are not parallel.

Second: That a stronger case in favor of the railroad is made by the case at bar than was made in the Henderson case. In the following argument we will endeavor to demonstrate the error of this assertion.

Third: That the case at bar is similar to that of

Baltimore & Ohio R. Co. v. *Goodman*, 275 U. S. 66, 72 L. Ed. 167, 48 Sup. Ct. Rep. 24.

We have already pointed out that that case did not discuss a constitutional question but was one originating in the federal courts in which no constitutional question was raised and that the Court did in fact charge the jury in substantial accordance with the principle laid down in that decision.

POINTS OF LAW.

In addition to the assignments of error, and by way of grouping them, counsel for appellant divide the arguments into five points of law set forth on pages 22 and 23 of their brief. We will endeavor, in order that the brief may correspond as near as practicable, to follow the same order in presenting our argument.

FIRST POINT OF LAW.

Does the Statute Deny Appellant and Those Likewise Situated (Railroad Companies) the Equal Protection of the Law Because It Requires Companies to Carry Throughout the Trial a Burden Not Cast Upon Other Litigants?

Assignment of Errors No. 1, No. 2 and No. 4:

The primary question which this case presents to this Court is whether or not the Florida Statute heretofore quoted is unconstitutional as a violation of the Fourteenth Amendment of the Constitution of the United States. In approaching the construction of this statute and its application, to the case at bar, we must consider the prior decisions of the Supreme Court of Florida involving this statute, bearing in mind that:

> "The intent of a valid statute is the law and this is ascertained by a consideration of the language and purpose of the enactment." *State ex rel.* v. *Burr*, 84 So. 61, 79 Fla. 290; *State* v. *Beardsley*, 94 So. 660, 84 Fla. 109.

The statute here under consideration

> "Does not require a presumption against the company to be carried into a consideration of the evi-

dence, but only that the negligence of the defendant is presumed unless removed by a preponderance of the evidence, which is no more than the statutory burden that the company shall make it appear that it was not negligent." *S. A. L. Ry. Co.* v. *Moseley,* 53 So. 718, 60 Fla. 186.

"The presumption of negligence cast upon railroads by our statute in personal injury cases ceases when the railroad company has made it appear that its agents have exercised all ordinary and reasonable care and diligence. In the presence of such proofs by the railroad company, the jury do not take any such presumption with them to the jury room in weighing the evidence and in coming to a determination. The statute does not create such presumption as will outweigh proofs or that will require any greater or stronger or more convincing proofs to remove them. All that the statute does in creating the presumption is thereby to cast upon the railroad company the burden of affirmatively showing that its agents exercised all ordinary and reasonable care and diligence, and here the statutory presumption ends." *S. A. L. Ry. Co.* v. *Thompson,* 48 So. 750, 57 Fla. 155.

In the case of *Western & Atlantic Railroad Company* v. *Henderson, supra,* upon which the appellant's case is almost entirely dependent, this Court held:

"Appellee insists that Sec. 2780 is valid and argues that the presumption, being one established by a statute, has the effect of evidence and that it is for the jury to decide whether the company's evidence is sufficient to overcome the presumption, that 'it should not, as a matter of law, be dissipated the instant any testimony is taken against it,' and that the issue is to be determined on a consideration of all the evidence including the presumption."

We do not contend, nor has the Supreme Court of Florida held that the presumption cast by the statute should receive any such construction as that contended for by the appellee in the Henderson case, and we think it is significant that this Court did not hold the Georgia Statute to be unconstitutional *per se*, but in rendering its decision was careful to base its decision upon the construction placed upon the Georgia Statute in that particular case, the Court said:

> "That (Statute) of Georgia *as construed in this case* creates an inference that is given the effect of evidence to be weighed against opposing testimony and is to prevail unless such testimony is found by the jury to preponderate."

Even a casual comparison of the case at bar with the Henderson case discloses that an entirely different construction was placed upon the statute by the Court in charging the jury in this case from the construction placed upon the Georgia Statute in the Henderson case. While it is true the statutes are very similar if not identical in their phraseology, yet the construction placed on that language in the two cases is so different that the rule laid down in the Henderson case is not applicable to the case at bar. It will be noted that the Court was very careful to charge the jury that if the Railroad Company meets the burden cast upon it by the statute:

> "The jury do not take any such presumption with them to the jury room in weighing the evidence and in coming to a determination. The statute does not create such a presumption as will

outweigh proof or that will require any *greater* or *stronger* or *more convincing* proof to remove it" (R. 40).

We submit that the construction of the Florida Statute as made in this case can be most aptly described by the language of this Court:

> "The statutory effect of the rule is to provide that evidence of an injury arising from the actual operation of train shall create an inference of negligence, which is the main fact in issue. The only legal effect of this inference is to cast upon the railroad company the duty of producing some evidence to the contrary. When that is done the inference is at an end, and the question of negligence is one for the jury upon all the evidence. In default of such evidence, the defendant, in a civil case, must lose, for the *prima facie* case is enough as a matter of law.
>
> "The statute does not therefore deny the equal protection of the law or otherwise fail in due process of law because it creates a presumption of liability, since its operation is only to supply an inference of liability in the absence of either evidence contradicting such inference." *Mobile J. & K. C. R.* v. *Turnipseed,* 219 U. S. 35, 55 L. Ed. 78, 32 L. R. A. (U. S.) 26. 31 Sup. Ct. Rep. 136 Ann. Cas. 1912A, 463, 2 N. C. C. A. 243.

It is urged by the appellant, however, that the Court should by its charge have assumed that the Railroad had met the burden of proof cast upon it by the statute and have so charged the jury in effect by refusing to charge the jury on the statute. This contention can not be sustained for two reasons:

First: The evidence by the appellant in the trial court is sufficient in itself to show negligence on the part of the railroad employees, by showing, as has been heretofore pointed out, that the whistle of the train did not blow except simultaneously with the application of the brakes and that the train moved only a distance of its length after the brakes were applied and that the last coach was on the crossing when the train was finally brought to a stop, which makes it mathematically certain that the locomotive was on the crossing when the whistle was first sounded. This not only fails to show lack of negligence, but actually shows negligence on the part of the railroad employees.

Fla. C. & P. R. Co. v. *Foxworth,* 41 Fla. 1, 25 So. 338.

At least the jury were justified in drawing this conclusion.

Second: There is another and stronger reason why the Court should not have refused to charge the jury on the statute, which is that under the decisions of the Florida Courts it is improper for a trial judge to comment upon the evidence or draw inferences from the evidence or invade the province of the jury by assuming the proof of controverted facts.

> "The Court has no right to invade the province of the jury by assuming as proven facts, matters which are in dispute upon the trial." *Fla. C. & P. R. Co.,* v. *Foxworth, supra.*

See also:

F. E. C. Ry. Co. v. *Carter,* 67 Fla. 335, 65 So. 254.

Southern Pine Co. v. *Powell,* 48 Fla. 154, 37 So. 570.

Lewter v. *Tomlinson,* 54 Fla. 215, 44 So. 935.

Mayer v. *Wilkins,* 37 Fla. 244, 19 So. 632.

Appellant relies largely upon the decision of the Supreme Court of Mississippi in the case of:

N. O. & G. N. R. Co. v. *Walden,* 160 Miss. 102, 133 So. 241.

And the Georgia case of:

Seaboard Air Line Ry. Co. v. *Fountain,* 173 Ga. 593, 160 S. E. 789.

We submit that the Walden case places the construction upon the Henderson case which is entirely unjustified. It in effect holds that the Henderson case overrules the decision of the Turnipseed case, whereas, in fact, the Henderson case clearly recognizes and approves the rule laid down in the Turnipseed case. We think the correct construction of the principle laid down in the Henderson case is found in the opinion of McGowen, J., concurred in by Cook, J.

> "I think the Henderson case is limited, both by its syllabus and opinion to the facts therein stated."

The majority opinion of the Mississippi Court in the Walden case overruled a number of decisions of that Court based upon the Turnipseed case, and the Turnipseed case itself was at least in part overruled

by the construction placed upon the Henderson case. We do not think this was justified by any part of the decision in the Henderson case.

The Georgia Court in the Fountain case places a different construction upon the Turnipseed case from that placed upon it by the Supreme Court of Mississippi in its decisions prior to the decision by this Court in the Henderson case. The charge to the jury in the Fountain case is much stronger against the railroad than the charge in the case at bar, because in the case at bar the jury were particularly charged that the presumption ceased as soon as a preponderance of the evidence made it appear that the agents of the railroad had exercised all ordinary reasonable care and diligence and in the presence of such proof:

> "The jury do not take any such presumption with them to the jury room in weighing the evidence and in coming to a determination. The statute does not create such a presumption as will outweigh proof or that will require any greater or stronger or more convincing proof to remove it."

We respectfully submit that this charge brings this case clearly within the rule laid down in the Turnipseed case and that there is nothing whatever in the Henderson case holding such rule to be in violation of the Fourteenth Amendment to the Constitution.

We again call the attention of the Court to the fact that under the law of Florida a trial judge is not permitted to comment upon the evidence and can only charge the jury upon the law of the case, upon whom the burden of proving the various allegations, depend,

and upon what conditions the burden of proof shifts, and the Court in its charge can not presume any fact to have been proven where the evidence is at all conflicting and can not discuss the weight of the evidence or the probative force of the evidence. Authorities *supra.*

The Court, in this case, then very properly charged the jury as to the burden cast upon the Railroad Company by the statute and then charged them that if this burden were met by the evidence that the presumption did not go with them into their room when they went into a consideration of the case.

We submit that a proper determination of the question here presented rests upon an application of the principles laid down in the Henderson case and those laid down in the Turnipseed case. We submit that in view of the evidence and the charge of the Court in the case at bar it falls in line with the Turnipseed case, and that the decision of this Court in that case is applicable and the statute should not be held to be unconstitutional.

It is next contended under the same heading in appellant's brief, that the statute is unconstitutional because it does not apply to those railroad lines operated in connection with private business enterprises while it does apply to railroad companies that are common carriers.

As we have pointed out, the Court will take judicial notice of the fact that such railroads as are used in connection with private enterprises, sawmills, mines and industrial plants are short and the use of these

roads is essentially different and the traffic over these roads is essentially different in type and operate from the use of and traffic upon the great railroad systems of Florida and of the country as a whole.

It is also urged that the law is unconstitutional in that it does not apply to common carriers who use motor vehicles as their means of transportation.

These points bring up the question of legislative classification for the purpose of regulation under the police powers of the state and so fall more logically under the Second Point of Law urged by appellant, and they will be discussed and the authorities will be cited under a discussion of appellant's Second Point of Law.

SECOND POINT OF LAW.

Is the Statute Invalid and Discriminatory in That It Imposes Upon Appellant and Those Likewise Situated (Railroad Companies) a Burden Not Imposed Upon Motor Carriers for Hire?

Assignment of Error No. 3:

The question here presented is whether or not the classification of railroads, which are common carriers and public utilities apart from those private lines which are not common carriers, but are a mere adjunct to some other business, and apart from common carriers who use motor vehicles as their means of transportation is in violation to the Fourteenth Amendment to the Federal Constitution.

> "The rules by which this contention must be tested, as is shown by repeated decisions of this Court are these: 1. The equal protection clause of the Fourteenth Amendment does not take from the

state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary. *Bachtel* v. *Wilson*, 204 U. S. 36, 41, 27 S. Ct. 243, 51 U. S. (L. ed.) 357; *Louisville, etc. R. Co.* v. *Melton*, 218 U. S. 36, 30 S. Ct. 676, 54 U. S. (L. ed.) 921; *Ozan Lumber Co.* v. *Union County Nat. Bank*, 207 U. S. 251, 256, 28 S. Ct. 89, 52 U. S. (L. ed.) 195; *Munn* v. *Illinois*, 94 U. S. 113, 132, 24 U. S. (L. ed.) 77; *Henderson Bridge Co.* v. *Henderson*, 173 U. S. 592, 615, 19 S. Ct. 553, 43 U. S. (L. ed.) 823." *Lindsley* v. *National Carbonic Gas Co.*, 220 U. S. 61, 315 S. Ct. 337, 55 L. Ed. 369, Ann. Cas. 1912C, 160.

A statute making it unlawful for telegraph companies to, by contract, limit liability for negligent failure to deliver a telegram without similarly restricting express companies and other common carriers, does not deny telegraph companies equal protection of the law or due process of law.

Western Union Telegraph Company v. *Commercial Milling Company*, 218 U. S. 406, 31 S. Ct. 59, 54 L. Ed. 1088, 36 L. R. A. N. S. 220, 21 Ann. Cas. 815.

A statute making railroad companies liable for all damages sustained because of failure to fence their railroad tracks including reduction in value of the adjoining land by reason of the lack of such fences, does not deprive the railroad company of equal protection of the law or take its property without due process of law, since no discrimination is made against any particular railroad company or corporation and all are treated alike and required to perform the same duty.

Minneapolis and St. Louis Railway Company v. *Emmons*, 149 U. S. 364, 13 Sup. Ct. Rep. 870, 37 L. Ed. 769.

A statute imposing absolute liability upon railroad companies for all property injured or destroyed by fire from its locomotives and giving it an insurable interest in the property and its protection does not deprive the railroad companies of its property without due process of law or deny the equal protection of the law.

St. Louis & S. F. Railway Company v. *Mathews*, 165 U. S. 1, 17 S. Ct. 243, 41 L. Ed. 611.

This Court has also held:

> "There is a difference between ordinary vehicles and cars propelled by electricity, which may be recognized by the state in the exercise of its police powers." *Detroit Ft. Wayne and Belle Isle Railway* v. *Osborne*, 189 U. S. 383, 23 S. Ct. Rep. 540, 47 L. Ed. 860.

Classifications of railroads on the basis of length for the purpose of fixing rates and also for the pur-

pose of regulating equipment required have been sustained by this Court as valid. *New York etc. R. Co.* v. *New York,* 165 U. S. 628, 17 S. Ct. Rep. 418, 41 L. Ed. 853; *Dow* v. *Beidelman,* 125 U. S. 680, 8 Sup. Ct. Rep. 1028, 31 L. Ed. 841.

This Court has even gone so far as to hold constitutional an act imposing a penalty upon railroad companies permitting Johnson grass to grow to seed on their right of way, when the adjoining land owner does not permit such grass to grow to seed on his property when the act did not apply with equal force to another adjoining land owner who was not a railroad company. *Missouri K. & T. R. Co.* v. *May,* 194 U. S. 267, 24 S. Ct. 638, 48 L. Ed. 971.

> "In *Missouri P. Ry. Co.* v. *Mackley,* 127 U. S. 205, 32 L. Ed. 107, the law of Kansas was passed which abrogated as to railroads the rule of the common law exempting masters from liability to one servant for the negligence of another. It was sustained as a valid classification notwithstanding that it did not apply to other carriers or even to other corporations using steam." *Orient Insurance Company* v. *Daggs,* 172 U. S. 557, 19 Sup. Ct. Rep. 281, 43 L. Ed. 552.

In the case last quoted from a statute of Missouri affecting fire insurance companies but not extending in its operation to other insurance companies was sustained, the Court holding that the classificaton was not arbitrary.

The fact that the act does not apply to the small "dummy" lines which serve to haul logs into sawmills, ore from mines to refineries, etc., is not an un-

reasonable classification. The Court judicially knows that the use of these private enterprises is essentially different from the use of the common carrier railroad lines, that the speed of the traffic and the nature of the traffic is essentially different and that they occupy entirely different positions in the economic structure of the state, and we submit that the Legislature of Florida is entirely within the legitimate exercise of its police power in making the classification different.

The Legislature of the State of Florida has seen fit to recognize the manifest differences between the operation of railroad trains and the operation of motor vehicles, and has enacted laws regulating the operation of motor vehicles, upon the public highways of the state, affecting the age of operators, (1290) C. G. L. 1927, brakes (1294) C. G. L. 1927, lights (1294, 1319) C. G. L. 1927, height of vehicle with load (1296) C. G. L. 1927, passing other vehicles (1296) C. G. L. 1927, conduct at railroad crossings (1324) C. G. L. 1927, reckless operation (1296) C. G. L. 1927, the side of road upon which the vehicle must be driven (1296) C. G. L. 1927, the speed of the vehicle (1296) C. G. L. 1927, stopping on public highways (1320), C. G. L. 1927, the width of the vehicle with load (1296) C. G. L. 1927, etc., thus manifestly protecting the public safety by regulations different from those deemed necessary to protect the public from injuries resulting from accident at railroad crossings.

In 1929, the Legislature of the State of Florida enacted Chapter 13700, regulating the use of the public highways by common carriers providing for supervision by the Railroad Commission and making such other regulations as the public good, in the opinion of the Legislature, required. In 1931, Chapter 14764 was enacted, which regulates more particularly and more strictly the use of the public highways of Florida, by common carriers using motor vehicles as a means of transportation.

That the Legislature of the state may recognize differences between different modes of transportation and so classify them as in the Legislative judgment is best for the public good, and this does not deprive the carrier of one type of the equal protection of the law, nor deprive it of its property without due process of law.

Savannah T. & I. of H. Railway v. *Savannah*,
198 U. S. 392, 25 S. Ct. 690, 49 L. Ed. 1097.

The appellant argues that because both are common carriers the same rule of liability must apply, regardless of the fact that the means of transportation, the essential nature of the methods employed in conducting the business, and the relationship of the vehicle used to the traveling public not employing the carrier, and denies the right of the Legislature to classify different modes of conducting the business of the common carriers, we submit that the appellant has failed to meet the burden of showing that the classification complained of does not rest upon any reasonable basis or that it is essentially arbitrary

and on the contrary we submit that it is obvious from a consideration of the question that the classification is essentially reasonable and just and is based upon essential differences in the classes referred to, which the Legislature of Florida was within its constitutional powers in recognizing in the performance of its duties in regulating the subjects of the classifications.

THIRD POINT OF LAW.

Does the Statute as Construed by the Supreme Court of the State of Florida, the Court of Last Resort in Said State, Illegally Impose upon Appellant and Those Likewise Situated (Railroad Companies) a Burden Throughout the Trial of Any Cause in Which It Is Invoked That Is Not Cast upon Other Litigants?

Assignment of errors Nos. 5, 6, 7, 8, 9 and 12:

Under the appellant's third point of law, various excerpts from the charge of the Court are attacked. The arguments presented are all within the rule discussed under the first point of law and a determination of the question raised under the first point of law determines the question raised here.

As above pointed out, the question that presents itself to the Court is whether the case at bar, taking into consideration the construction of the statute by the state court which this Court will adopt, and the charge to the jury under this construction of the statute, falls within the rule laid down in the Henderson case, or whether it falls within the rule laid down in the Turnipseed case. If the Court be of the opinion that the Henderson case is applicable, then the appel-

lant's contention must be sustained and the Supreme Court of Florida must be reversed. If, however, the Court is of the opinion as we have argued in prior pages of this brief that the rule laid down in the Turnipseed case is the one properly applicable here, then the case, we submit, should be affirmed by this Court.

In considering the charge of the Court we can not rely upon mere excerpts selected at random or take those portions most favorable to one litigant and disregard those portions most favorable to the other litigants but the charge must be taken and considered as a whole and, when so considered, we submit that the appellant has not shown that in this case it has been deprived of any constitutional right or that any guarantee of the constitution has been denied it. Our position on the questions here presented has been fully outlined in the argument under the first point of law, and we respectfully refer the Court to that argument, rather than burden the Court with a repetition of the same statement under this heading of our brief.

FOURTH AND FIFTH POINTS OF LAW.

Fourth.

Did the Refusal of the Trial Court Because of the Statute in Question, Sustained by the State Appellate Court, to Give the Second Charge Requested by the Defendant Which Invoked the Rule Laid Down by This Court in the Goodman Case, Supra, Deprive Appellant of Its Process of Law and the Equal Protection of the Law?

And

FIFTH.

Did the Refusal of the Trial Court, Sustained by the State Appellate Court, to Give the Third Charge Requested by the Defendant Which Invoked the Same Rule of Law Deprive Appellant of Any Constitutional Right?

Assignment of errors Nos. 10 and 11:

As heretofore pointed out in the case of

Baltimore & Ohio R. Co. v. *Goodman*, 275 U. S. 66, 72 L. ed. 167, 48 Sup. Ct. Rep. 24,

was not decided by the Court upon any constitutional question but seems to have been decided upon a question of law of negligence. The case originated and proceeded throughout its history in the federal courts. No question of constitutional law seems to have been raised by either party, and we submit that it has no application to the case at bar except as it may lay down a rule of law as to negligence.

Since in the present case this Court can only consider constitutional questions, as its appellate jurisdiction from a decision of the Supreme Court of a state is limited to a determination of a federal question, we submit that no ground for federal jurisdiction is shown to appear and that the Court should not consider any argument by the appellant under this point of law. However, the Court did in fact charge the jury in substantial compliance with the rule laid down in the Goodman case (R. 38). The charge given substantially states the law as laid down in the Goodman case and the instruction refused, made the basis of the tenth

assignment of error, was properly refused since the point had been covered in the general charge.

The third charge requested, made the basis of the eleventh assignment of error, is clearly bad in that it assumes a fact which was in issue to have been proven, to-wit: that the plaintiff's servant was negligent, and the Court should not have assumed the proof of a fact in litigation.

Conclusion.

In conclusion, we respectfully submit that this Court should not reverse the Supreme Court of Florida unless the appellant has made it appear that in this particular case it has been deprived of some constitutional right and that the loss of such right has resulted in its damage.

We believe that we have demonstrated to the Court that no constitutional right of the appellant has been violated, and we respectfully submit that the decision of the Supreme Court of Florida should be affirmed by this Court.

Respectfully submitted,

JOHN E. MATHEWS,
H. M. TAYLOR,
Counsel for Appellee.

SUPREME COURT OF THE UNITED STATES.

No. 4.—October Term, 1932.

Seaboard Air Line Railway Company, Appellant, *vs.* A. W. Watson.	Appeal from the Supreme Court of the State of Florida.

[November 7, 1932.]

Mr. Justice Butler delivered the opinion of the Court.

Appellant seeks reversal of a judgment obtained by appellee upon the ground that § 7051 of the Compiled General Laws, 1927, as construed below is repugnant to the due process and equal protection clauses of the Fourteenth Amendment. § 237, Judicial Code, 28 U. S. C., § 344. Section 7051 declares: "A railroad company shall be liable for any damage done to persons, stock or other property, by the running of the locomotives, or cars, or other machinery of such company, or for damage done by any person in the employ and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company."

Watson sued the railway company to recover damages caused by a collision, at a highway grade crossing, between one of defendant's locomotives and plaintiff's mule team being driven by his employee. The declaration alleged that the collision was caused by the negligence of defendant in that it operated the train at excessive speed and failed by whistle or otherwise to give warning. Defendant pleaded not guilty and that the negligence of the driver was the sole cause of the accident. Plaintiff introduced evidence showing the collision and resulting damage. Defendant called witnesses whose testimony tended to show that its employees were not negligent and that the driver's negligence was the sole cause of the accident. Plaintiff produced witnesses in rebuttal who gave evidence to show that the accident resulted from the negligent failure of defendant to give proper warning.

In the course of its charge the court instructed the jury: (1) The plea of not guilty imposes on plaintiff the burden of proving that the damage was caused by alleged negligence of defendant; (2) "Our statute provides that a railroad company shall be liable for any damage done to stock or property of another by the running of locomotives or cars unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence,—the presumption in all cases being against the company"; (3) If defendant's employees and plaintiff's teamster were at fault the plaintiff may recover the amount of his damages reduced in proportion to the contributory negligence of his servant; (4) If the evidence establishes that the damage alleged was caused by the running of the locomotive, plaintiff may recover "unless the defendant company shall make it appear by a preponderance of the evidence that its employees exercised all ordinary and reasonable care and diligence in the premises"; (5) The defendant submitted a request to charge which was by the court "slightly modified" and given as follows: "The presumption of negligence cast upon railroads by our statute in personal injury cases ceases when the railroad company has made it appear by a preponderance of the evidence that its agents have exercised all ordinary and reasonable care and diligence. In the presence of such proof by the railroad company the jury do not take any such presumption with them to the jury room in weighing the evidence and in coming to a determination. The statute does not create such a presumption as will outweigh proofs, or that will require any greater or stronger or more convincing proofs to remove it". Defendant submitted two requests for instructions in respect of negligence on the part of the teamster but the court refused to give them.

The jury gave plaintiff a verdict for the amount of his damages and the trial court entered judgment thereon. The supreme court sustained the finding of negligence on the part of the defendant, but held that the evidence established contributory negligence and ordered that unless plaintiff enter a remittitur for a specified sum the judgment should be reversed and a new trial granted. The plaintiff made the reduction and judgment was entered for the remainder.

The Florida statute in question is the same as that of Georgia condemned by this court as so unreasonable and arbitrary as to be

repugnant to the due process clause of the Fourteenth Amendment. It was not necessary to consider, and we did not decide, whether the statute also violated the equal protection clause. *Western & Atl. R. Co.* v. *Henderson,* 279 U. S. 639, reversing 167 Ga. 22.

Appellant failed in the trial court to assail the statute on any ground upon which rests our decision in the *Henderson* case. In its motion for a new trial and in the assignment of errors submitted with its proposed bill of exceptions, it asserted as to each of the instructions numbered (2), (3) and (4) that the court erred in so charging "because the effect of said charge was to deprive the defendant of the equal protection of the law, contrary to the Constitution of the United States". And it made the same objection to another charge which, so far as concerns questions before us, is not to be distinguished from instruction (4). Appellant has not included in the record its request which was by the court modified and given. It does not appear how the instruction differed from the request and, as appellant has not complained of the modification or of the charge as given, the instruction is to be considered as not differing materially from the request and to have been acquiesced in and accepted by appellant. The record on which the case was taken to the state supreme court discloses no contention on the part of appellant that as construed at the trial the statute is unreasonable or arbitrary or that it operated as a denial of due process of law. But the opinion of that court states—whether inadvertently we need not consider—that some assignments of error question the constitutionality of the section as denying the defendant "due process of law" and the equal protection of the laws. After reference to our decision in the *Henderson* case and to *Mobile, J. & K. C. R. R.* v. *Turnipseed,* 219 U. S. 35, the court said: "All that the statute does in this state in creating a presumption is thereby to cast upon the railroad company the burden of affirmatively showing that its agents exercised all ordinary and reasonable care and diligence, and here the statutory presumption ends", held that the trial court "properly instructed the jury in regard to the presumption in this case" and overruled appellant's contention that the statute is unconstitutional because it does not apply to busses as well as to railroads.

The errors assigned and urged here amount to no more than that as construed the section operated to deny appellant equal

protection because it required appellant to carry throughout the trial a burden not put upon motor carriers for hire or other litigants, and that the refusal of the trial court to give to the jury the requested instructions in respect of negligence on the part of the teamster deprived appellant of the equal protection of the laws.

In view of numerous decisions of this court sustaining legislative classifications for various purposes and declaring the principles upon which their constitutional validity depends, it does not require any discussion to show that the mere discrimination resulting from the application of the presumption created by § 7051 to appellant and other railroad companies and the failure of the State to prescribe the same or a like rule in similar actions against carriers by motor for hire or other litigants does not violate the equal protection clause of the Fourteenth Amendment. Appellant's contention to the contrary is without substance. *Missouri Pacific Railway Co.* v. *Humes,* 115 U. S. 512, 522. *Missouri Railway Co.* v. *Mackey,* 127 U. S. 205, 209. *Chicago &c. Railroad Co.* v. *Pontius,* 157 U. S. 209, 210. *St. Louis & San Francisco Ry.* v. *Mathews,* 165 U. S. 1, 24 *et seq. Gulf, Colorado & Santa Fe Ry.* v. *Ellis,* 165 U. S. 150, 157 *et seq. Atchison, Topeka &c. Railroad* v. *Matthews,* 174 U. S. 96. *Mobile, J. & K. C. R. R.* v. *Turnipseed, supra,* 41-42. *Truax* v. *Corrigan,* 257 U. S. 312, 337.

The assignments of error accompanying this appeal contain a single reference to due process. It is in a specification which merely asserts that the state supreme court "erred in holding that the scope and effect of Section 7051 . . . did not in the trial of this case in the Court below deprive the . . . Railway Company . . . of its property without due process of law and of the equal protection of the law as guaranteed to it" by § 1 of the Fourteenth Amendment.

It is essential to a proper presentation of points relied on for reversal that the statute and rules of court requiring and governing the forms of assignments of errors be complied with. Every appeal must be accompanied by an assignment of errors which shall "set out separately and particularly each error asserted". R. S., § 997, 28 U. S. C., § 862. Rule 9. The purpose is to enable the court, as well as opposing counsel, readily to perceive what points are relied on. The substitution of vague and general statement for the prescribed particularity sets the rule at naught. *Phillips, etc. Const. Co.* v. *Seymour,* 91 U. S. 646, 648. *Briscoe* v.

Dist. of Columbia, 221 U. S. 547, 549-550. And as the rule makes for convenience and certainty in the consideration of cases the court may, and generally it will, disregard a specification that is so uncertain or otherwise deficient as not substantially to comply with the rule even if the opposing party raises no question and treats it as adequate. The quoted assignment amounts merely to a complaint that the supreme court erred in not reversing the judgment of the trial court because "in the trial of this case" the "scope and effect" of the section deprived appellant of its property in violation of both the due process and equal protection clauses. An allegation of error could scarcely be more indefinite. It does not identify any ruling at the trial or specify any basis for the assertion of deprivation of constitutional right. It presents no question for our consideration.

The assignments of error based upon the court's failure to instruct the jury concerning contributory negligence of plaintiff's teamster in accordance with defendant's requests present no question for decision here. The record discloses no foundation for the claim that the refusal so to charge was, as appellant asserts, "because of the statute". It does not appear that the trial court regarded the statute as having any relation to the precaution or care required of plaintiff's driver when approaching the crossing. The claim that such refusals transgressed the constitutional rule of equality is utterly without foundation.

No substantial constitutional question being presented, the appeal will be dismissed. *Wabash Railroad Company* v. *Flannigan,* 192 U. S. 29. *Erie Railroad* v. *Solomon,* 237 U. S. 427, 431. *Sugarman* v. *United States,* 249 U. S. 182. *Zucht* v. *King,* 260 U. S. 174. *Roe* v. *Kansas,* 278 U. S. 191.

It is so ordered.

Mr. Justice BRANDEIS took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.